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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34604-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SANDRA M. GALVIS, a divorced woman, and ALEXANDER
MONCADA, a single man, d/b/a LA POPULAR CASH & CARRY
MARKET, LLC; JAMES R. MASEWICZ and VIRGINIA F. MASEWICZ,
husband and wife; and ASH RESOURCES, LLC.

Respondent/Cross-Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant/Cross-Respondent.

OPENING BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT

This case is about safe vehicle access to our public highways. Access in this context refers to the ability of a vehicle to enter and leave the highway from an adjoining property. After noticing an exceptionally high accident frequency along a five-mile stretch of State Route 7 (“SR 7”) in Parkland, the Washington State Department of Transportation (“WSDOT”) developed a safety project to install sidewalks, lighting and driveways. The purpose of the project was to reduce the number of access points and better define access connections to the adjoining commercial properties. WSDOT engineers believed the project would reduce the accident rate.

The project called for WSDOT to use the regulatory authority of Ch. 47.50 RCW, the Highway Access Management Act, to impose highway access standards on SR 7. The project modified access to about 160 properties. Four owners sought adjudicative hearings to contest the proposed access modifications.

Those owners alleged that their existing access was not unsafe and the project would deprive them of their right to reasonable vehicular access to their properties. After individual evidentiary hearings an Administrative Law Judge (“ALJ”) upheld the proposed agency actions

and the WSDOT Reviewing Officer affirmed each initial order. The owners sought judicial review.

The Superior Court dismissed the owners' claims that Ch. 47.50 RCW was facially unconstitutional and that WSDOT provided an improper administrative process. However, in its review of the Reviewing Officer's factual findings, the court misapplied the substantial evidence standard of review. Instead of reviewing the administrative record to determine whether the Reviewing Officer's findings were supported by substantial evidence in the record, the court examined whether *the owner's contentions* were supported by substantial evidence.

When this Court reviews the administrative record, it will see that each of the Reviewing Officer's findings is supported by substantial evidence in the record and that each access connection modification is consistent with WSDOT's regulatory authority. WSDOT respectfully requests that this Court reverse the Superior Court and affirm the final agency orders in all three of these consolidated cases.

II. ASSIGNMENTS OF ERROR

- 1) The trial court erred by entering the April 17, 2006 order reversing the agency's final orders.
- 2) The trial court erred by denying WSDOT's motion to reconsider.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) Must factual findings in final agency orders be affirmed when they are supported by substantial evidence in the administrative record?
- 2) Is there substantial evidence in this record to support the WSDOT Reviewing Officer's finding that too many access points and the undefined access connections along SR 7 were highway safety or operational problems?
- 3) Is there substantial evidence in this record to support the WSDOT Reviewing Officer's finding that the project did not deprive the owners of reasonable access to their properties?
- 4) Do commercial property owners have a right to utilize highway right-of-way for customer and employee parking?

IV. STATEMENT OF THE CASE

A. The SR 7 Highway Safety Project.

SR 7 is an old state highway that carries north-south traffic between the Parkland-Spanaway area and Tacoma. The highway was originally constructed in the 1920s through a then rural area.¹ Over the decades, the area urbanized and the highway now runs through a

¹ Administrative Record ("AR") at 300000227 (Galvis). Note that the vast administrative record was not paginated with Clerks Papers numbers despite appellants having designated them as such. All references to the administrative record will be to the Bates number.

commercial district.² For highway management purposes, this segment of SR 7 is designated a Class IV highway north of 176th Ave. and a Class III highway south of 176th Ave.³ *See generally* WAC Ch. 468-52 (regulations pertaining to highway access control classification systems and design standards). Consistent with WSDOT's design standards, a class III highway is to have no more than a single access point every 330 feet, whereas a Class IV highway can have no more than one every 250 feet.⁴

Since the 1970s, the amount of traffic on SR 7 has increased by several thousand vehicles per day. Increased accidents have accompanied the increased traffic.⁵ The portion of SR 7 encompassing the safety project is heavily congested and has an accident rate almost twice that of than similar state highways.⁶ About half of these accidents are non-intersection related and attributable to too many access connections and undefined highway access.⁷ After much study, WSDOT concluded that a significant cause of many of these accidents is the large number of poorly-defined access points connecting many of the commercial properties to

² AR at 300000212 (Galvis); *see also* AR at 300001673-74 (Masewicz)

³ AR at 300001676 (Masewicz); AR at 300000228 (Galvis).

⁴ AR at 300001007 (Ash).

⁵ AR at 300000316 (Galvis).

⁶ AR at 300000314-315 (Galvis); AR at 300000702-703 (Galvis); AR at 300001706 (Masewicz).

⁷ AR at 300000702 (Galvis); AR at 300001321 (Ash); AR at 300002107 (Masewicz)

SR 7.⁸ These substandard access connections confuse and distract drivers, causing accidents at the connections and in the travel lanes.⁹

To address the problem, WSDOT proposed a highway safety improvement project along a five mile stretch of SR 7. The project runs from 112th Street in the north to 188th Street in the south (commonly known as “the Roy Y”).¹⁰ To define vehicle access, WSDOT imposed current access design standards, proposed to install grass-lined drainage swales, sidewalks and concrete driveway approaches along the highway frontage throughout the corridor.¹¹ The project did not require WSDOT to acquire any property from the owners and the agency bore the entire cost of the project.¹² The project will improve highway safety by eliminating many access connections and by confining access to readily identifiable and predictable points along the frontage.¹³ The new sidewalks promote traffic safety by separating the pedestrians from vehicular traffic and by defining the driveway locations.¹⁴

The project went through significant public review with WSDOT conducting meetings with numerous business owners and community

⁸ AR at 300000299-300 (Galvis); AR at 300000332-333 (Galvis).

⁹ AR at 300000242-43 (Galvis).

¹⁰ AR at 300000229 (Galvis); AR at 300000949 (Ash); AR at 300001675 (Masewicz); *see also* 300001179 (aerial photo), attached as Appendix 1.

¹¹ AR at 300000229 (Galvis); AR at 300000877.

¹² AR at 300000255 (Galvis).

¹³ AR at 300000229 (Galvis).

¹⁴ AR at 300000336-337 (Galvis).

groups.¹⁵ Upon project completion, WSDOT will have modified over 160 access connections to SR 7. Owners Galvis, Moncada, Masewicz and Ash own commercial property with access connections WSDOT also intends to modify.

Sandra Galvis and her son, Alexander Moncada, own a property just south of 112th Street.¹⁶ They own and operate the La Popular Cash and Carry Market LLC, a retail business specializing in Latino-American products and services.¹⁷ James and Virginia Masewicz own the property next door. Located on this property are two buildings that sit directly next to La Popular. The Masewiczs own and operate Disc Jockeys and Video and lease to commercial tenants, On-Line TV, Park Avenue Auto, Skin Effects and La Popular and four residential tenants.¹⁸

The buildings are situated so close to the highway right-of-way that cars parking diagonally in front protrude onto the highway right-of-way.¹⁹ Without using the highway right-of-way, only two vehicles can safely park in front of the Galvis/Moncada property and three in front of the Masewicz property.²⁰

¹⁵ AR at 300000233 (Galvis); 30000000951 (Ash); 30000001675 (Masewicz).

¹⁶ AR at 300000073 (Galvis); 3000000090 (Galvis).

¹⁷ AR at 300000074-75 (Galvis).

¹⁸ AR at 300001722-23 (Masewicz).

¹⁹ AR at 300001680 (Masewicz), *See also* AR at 300000769-772 (color photos of present configuration), attached as Appendix 2.

²⁰ AR at 300000257; 300001684 (Masewicz).

WSDOT developed its planned improvements for these properties with the property owners' input. Originally, WSDOT proposed to block all access as it needed to install drainage swales next to the sidewalk so that it would be in compliance with the local jurisdiction's stormwater permitting requirements.²¹ However, after a meeting with the owners, WSDOT adopted the current plan which increases the cost of the project but provides better access to the properties. By removing the drainage swales and designing an alternative manner of dealing with storm water drainage, WSDOT can provide two breaks in the sidewalk, one for ingress and another for egress. Further, the owners will continue to be able to make use of a portion (albeit significantly smaller) of the right-of-way for maneuvering vehicles on their property.²² In designing this plan, WSDOT made sure that the largest vehicles which currently access the property would continue to be able to access the property.²³ This design does not alter the five legal parking spaces in front of the properties.²⁴

The safety problem at the Ash property arises from number of proximity of current access points. The Ash's property is approximately

²¹ AR at 300000251-53 (Galvis); *see also* AR at 300001682 (Masewicz).

²² AR at 300000257 (Galvis).

²³ AR at 300000066-67, attached as Appendix 3 (design plans for Galvis/Moncada and Masewicz).

²⁴ AR at 300000257 (Galvis); 300001684 (Masewicz)

7.5 acres and abuts both SR 7 and 184th Ave.²⁵ The Ash's currently lease the largely undeveloped property to G & L Bark Supply, a business selling landscape materials such as beauty bark, top soil and gravel to residential and commercial customers.²⁶ The property is currently configured so that vehicles may enter and leave at either of the two access points which are defined by a fence on the Ash property.²⁷ The property has approximately 430 feet of SR 7 frontage and there are currently no curbs or other structures in the right-of-way to define the particular access points.²⁸ As it is a corner property, it also has potential access to 184th Ave.²⁹ The vehicles using the Ash property include large semi trucks, dump trucks and trailers, solo dump trucks, cars and pick ups.³⁰ The trucks can be 30-40 feet long and occasionally as long as 50 feet.³¹

As it is located immediately north of 188th, the Ash property sits within the section of SR 7 designated as a Class III highway. Therefore, the design standards call for access points to be separated by 330 feet. The property currently has two 25-foot wide driveway approaches to SR 7

²⁵ AR at 300001011 (Ash).

²⁶ AR at 300000884 (Ash).

²⁷ AR at 300001405, 1407 (Ash photos), attached as Appendix 4.

²⁸ AR at 300001110; *see also* AR at 300001405, 1407 (Photos of Ash property, attached as Appendix 4).

²⁹ AR at 300000970 (Ash).

³⁰ AR at 300000885 (Ash).

³¹ AR at 300000885 (Ash).

which neither meet the separation distance under the design standards nor are permitted by WSDOT.³²

Similar to the Galvis/Moncada and Masewicz access modification plans, the Ash plan was changed after consultation with the owners. WSDOT originally proposed to eliminate the southern 25-foot driveway and expand the northern driveway to 40 feet wide, which would be equivalent to three lanes of traffic.³³ However, after the owners objected to the size of the driveway at the administrative hearing, WSDOT agreed to expand it to 50 feet.³⁴ The single 50-foot access point will be defined by sidewalks.³⁵

B. The WSDOT's Authority to Regulate Highway Access.

1. The Right to Reasonable Access and Washington's Highway Access Management Act.

The Legislature, WSDOT and the courts have long recognized that unregulated access to state highways creates safety problems. *See State ex rel Eastvold v. Superior Court for Cowlitz County*, 47 Wn.2d 335, 337-39, 287 P.2d 494 (1955) (discussing a 1953 project to limit access to a state highway). "Access" refers to the physical, vehicular access to the

³² AR at 300000885 (Ash).

³³ AR at 300000950. *See also* AR at 300001180 (Diagram depicting 39.4 foot access point), attached as Appendix 5.

³⁴ AR at 300000950 (Ash).

³⁵ AR at 300001099 (Ash).

property. *E.g., State v. Wineberg*, 74 Wn.2d 372, 375, 444 P.2d 787 (1968).

In 1991, the Legislature found that the unregulated access to the state highway system endangered travelers, contributed to traffic congestion and the functional deterioration of the state highway system, and generally damaged public health, safety and welfare. RCW 47.50.010(1)(b). Lawmakers determined that the regulation of access to the state highway system was necessary to improve safety and preserve the substantial public investment in state highways. They passed a comprehensive bill (Laws of 1991, Ch. 202), the Highway Access Management Act, intended to “provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the [legislature’s] findings and policies.” “Highway access management” increases the carrying capacity of the state highway system, reduces traffic accidents and associated personal injuries and property damage, promotes sound growth management, economic growth and mitigates environmental degradation. RCW 47.50.010(1)(c).

The access management statute provides that all state highways (except “limited access” facilities, such as the major freeways) are “controlled access facilities.” RCW 47.50.010(2). It further provides that the “access rights of an owner of property abutting the state highway

system are subordinate to the public's right and interest in a safe and efficient highway system.” RCW 47.50.010(3)(a).

As the Legislature recognized, in Washington an owner of property abutting a public way has a right of reasonable access to the public way. RCW 47.50.010(3)(b). However, the right of reasonable access to the highway does not guarantee a particular means of access. *See, e.g., State v. Wineberg*, 74 Wn.2d 372, 376, 444 P.2d 787 (1968); *see also* RCW 47.50.010(3)(b); WAC 468-51-020(19) (“reasonable access means an access connection that is suitable for the existing and/or proposed property use that does not adversely affect the safety, operations or maintenance of the highway system”).

Similarly, a property owner does not have a right to a particular flow or pattern of traffic on the adjoining highway. *Walker v. State*, 48 Wn.2d 587, 589, 295 P.2d 328 (1956) (WSDOT may install a median barrier which prevents certain turning movements onto motel property without compensating the owner). WSDOT actions that change the flow of traffic within the highway right-of-way, thus, do not affect the rights of an access connection permit holder. *Irongate Partners, L.L.C. v. State*, 107 Wn. App. 777, 783, 27 P.3d 1259 (2001) (permittee does not have right to maintain traffic flow on highway). Additionally, access restrictions, which result in “mere inconvenience” to the business property

owner, are not a substantial impairment of the right to reasonable access. *E.g., Costellano v. State*, 38 A.D.2d 652, 357, N.Y.S.2d 162 (N.Y.1971) (court held that access revision which required large trucks using a business to make difficult maneuvers but still provided for ingress and egress did not impair the right of reasonable access).

Consistent with this case law, the Highway Access Management Act recognizes the limited nature of the access right. In particular, RCW 47.50.010(3)(b) provides that:

Every owner of a property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to Chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property.

2. Access Connection Permits.

Ch. 47.50 RCW directed the WSDOT to regulate access to the state highway system and to establish a permit system to manage connections to the state highways. *See* RCW 47.50.030 to RCW 47.50.080. All connections to the state highway system in existence prior to July 1, 1990 are considered to be “grandfathered” and do not require permits. *See* RCW 47.50.080(1).

WSDOT’s rules for access connection permits are published at WAC 468-51. The rules related to the closure or alteration of existing

access connections are set out at WAC 468-51-120 to 130. WSDOT may close permitted or “grandfathered” access connections if “the connection causes a safety or operational problem on the state highway system.” *See* WAC 468-51-120(1) and WAC 468-51-130. Similarly, a change in the “use, design or traffic flow of the property or of the state highway” may justify a modification of the access. *Id.* In this case, the proposed modifications were authorized because the existing undefined access to SR 7 poses safety and operational problems and the proposed access connections leave the owners with reasonable access to SR 7.

In addition, when WSDOT builds a project adjacent to private property, the agency modifies the number and location of access connections to comply with current access design standards. WAC 468-51-140(2). In this case, to install the grass-lined drainage swales and sidewalks, WSDOT must modify the existing full-frontage access from the property to SR 7.

The current design standard would ordinarily limit the access to the owners’ properties to a single access connection per individual property. WAC 468-52-040(4)(b)(ii)(A)-(B) provides the design standard for private direct access to Class IV highways, such as SR 7 north of 176th Ave.:

(A) No more than one access shall be provided to an individual parcel or to contiguous parcels under the same ownership unless it can be shown that additional access

points would not adversely affect the desired function of the state highway in accordance with the assigned access classification, and would not adversely affect the safety or operation of the state highway.

(B) The minimum distance to another public or private access connection shall be two hundred fifty feet. Nonconforming connection permits may be issued to provide access to parcels whose highway frontage, topography, or location would otherwise preclude issuance of a conforming connection permit.

Pursuant to these design standards, WSDOT decided that the building on the adjoining Galvis/Moncada and Masewicz properties would have two points of access, one of which would act as a point of entry and another as a point of exit. The WSDOT also proposed to consolidate the Ashs' two 25-foot access points into a single 50-foot point of access.

C. Procedural Background.

Following the public review process, WSDOT sent each property owner a letter that informed them of the proposed agency action and their rights.³⁶ The agency conducted informal negotiations with several owners and made numerous adjustments to the proposed access connection modifications. Of the approximately 160 proposed access modifications, only four property owners have requested adjudicative hearings. Each

³⁶ AR at 300000877 (Ash); 300001515-16; 300000019-20; (Masewicz); AR at 300002297-98 (Masewicz).

hearing³⁷ was held before Administrative Law Judge (“ALJ”), Honorable Selwyn Waters, assigned by the Office of Administrative Hearings. Each owner was allowed to present witnesses and documentary evidence and arguments. And in each case, ALJ Waters issued initial orders generally upholding the proposed agency action.³⁸

WSDOT’s regulations provide the opportunity for the State Design Engineer (Reviewing Officer) to review initial orders, as set out in the Administrative Procedures Act.³⁹ Each of the owners in this case sought the additional administrative review. The Reviewing Officer modified some findings and conclusions, but generally affirmed the agency action in each case.⁴⁰ Each owner then filed a petition for judicial review in the Pierce County Superior Court.

The Honorable Judge Ronald Culpepper was originally assigned to the cases and ordered that they be consolidated. Judge Culpepper heard the owners’ motion for a stay based on the theory that the Administrative Law Judge lacked jurisdiction to make a reasonable access determination. The owners argued that Article I, Section 16 of the Washington

³⁷ Separate hearings were held for the Galvis/Moncada and Masewicz properties despite the fact that WSDOT proposes to give them shared points of entry/exit which will have similar impacts on the illegal use of highway right-of-way for parking in front of the buildings.

³⁸ The three Initial Orders are attached as part of Appendices 6, 7 and 8.

³⁹ WAC 468-51-150; RCW 34.05.491.

⁴⁰ AR at 300000001-21 (Galvis Final Order), attached as Appendix 6; AR at 300001521-1539 (Masewicz Final Order), attached as Appendix 7; AR at 300000881-891 (Ash Final Order), attached as Appendix 8.

Constitution forbid an administrative decision-maker from making a finding of fact regarding whether WSDOT's proposed access modifications left them with reasonable access. Judge Culpepper denied the owners' motion.

The consolidated cases were then transferred to the Honorable Judge Lisa Worswick. WSDOT filed a summary judgment motion on the issue of the constitutionality of the administrative process. Judge Worswick granted the motion, holding that the administrative decision maker could make the initial reasonable access determination.⁴¹

After Judge Worswick's ruling, the owners remaining claims were transferred to a Judge pro tem, the Honorable Donald Thompson. Judge pro tem Thompson initially dismissed the property owners' miscellaneous statutory and equitable challenges and affirmed the agency's findings with regard to the safety issues presented by the currently uncontrolled access along SR 7. However, he decided that the administrative process was facially unconstitutional. Judge pro tem Thompson went on to find that the owners' contentions about a lack of reasonable access were supported by substantial evidence.⁴² These later rulings appeared inconsistent because if the administrative process was indeed unconstitutional, an evaluation of the rulings arising from it would be superfluous.

⁴¹ CP at 1-2.

⁴² Verbatim Report of Proceedings ("VRP") at 82-85 (Nov. 28, 2005).

Confused by Judge pro tem Thompson's apparent reversal of Judge Worswick's summary judgment order and the internal contradiction of his order, WSDOT filed a motion for reconsideration. Judge pro tem Thompson clarified that he had no intention of reversing Judge Worswick's summary judgment order on the constitutionality of the administrative process under Ch. 47.50 RCW and WAC Ch. 468-51. However, he concluded that credible evidence existed in the record to support the *owners'* contention that they would have unreasonable access if the WSDOT implemented its proposed access modifications.⁴³ Believing that Judge pro tem Thompson misapplied the substantial evidence standard of review,⁴⁴ WSDOT filed this appeal. The owners filed a notice of cross-appeal.

V. STANDARD OF REVIEW

This case involves review of a final agency order under the Administrative Procedures Act ("APA"), Ch. 34.05 RCW. As the parties challenging the agency actions, the owners have the burden of demonstrating invalidity. *Heidgerken v. Dep't of Natural Resources*, 99 Wn. App 380, 384, 993 P.2d 934 (2000). In its review of these final orders, this Court applies the APA standards of review directly to the

⁴³ VRP at 31-32 (Feb. 24, 2006). CP at 24-25.

⁴⁴ Note that in his order, Judge pro tem Thompson struck paragraph two, which provided that the standard of review for the reviewing officer's findings of fact is whether substantial evidence exists in the record. CP at 25.

agency record and does not defer to the Superior Court. *Public Utility Dist. No. 1 of Pend Oreille County v. State Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

Under the APA, the court reviews all challenged findings of fact under the “substantial evidence” standard. RCW 34.570(3)(e). *Heidgerken v. Dep't of Natural Resources*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000). The findings reviewed by the court are those of the final agency decision maker and not those of the ALJ who entered the initial order. *Tapper v. Employment Security Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). Substantial evidence is evidence in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, *cert denied*, 518 U.S. 1006 (1995). The substantial evidence standard is highly deferential to the agency factfinder. *ARCO Prod. Co. v. Wash. Util. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The court need not agree with the agency factfinder, but need only conclude that a reasonable person reviewing the record could agree. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 929 P.2d 510 (1997).

The court reviews an agency's legal conclusions *de novo* under the error of law standard. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 1213 (1982). Notwithstanding the *de novo*

review standard, courts will grant substantial weight to an agency's interpretation of an ambiguous statute that the agency administers. *Public Utility Dist. No. 1 of Pend Oreille County v. State Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

Courts will also give substantial weight to an agency's interpretation of its own rules. *Tapper*, 122 Wn.2d at 403. When reviewing mixed questions of law and fact, the court applies the standard described above to the factual and legal portions of the questions. *Tapper*, 122 Wn.2d at 403.

VI. ARGUMENT

Before the Superior Court, the owners' challenged findings of fact could be boiled down to two inter-related issues: Whether the Reviewing Officer erred in his conclusions that: 1) the current access configuration on these properties contributed to a corridor wide safety problem; and 2) whether the access modifications to the properties would leave the owners with reasonable access.

A. Substantial Evidence Shows That Too Many Undefined Access Points Caused Operational and Safety Problems on SR 7.

The record is filled with testimony and documents that support the Reviewing Officer's findings that a safety problem existed throughout the

project corridor.⁴⁵ The Reviewing Officer found that the WSDOT has recorded 400 accidents per year in the corridor.⁴⁶ Of these accidents, most are “angle” and “rear end” accidents associated with entry and exit from abutting properties.⁴⁷ The Reviewing Officer further found that:

*Prior to the implementation of the WSDOT’s project improvements there were no defined driveways, sidewalks, or structures to limit vehicle access to certain points of entry or exit off the highway and Appellants’ property. Such undefined, full-frontage access pose [sic] a traffic safety problem. Vehicle movement is unpredictable, and pedestrians are more at risk.*⁴⁸

Ch. 47.50 RCW allows WSDOT to close or modify an unpermitted access connection if it fails to meet minimum acceptable standards of highway safety or if there is a change in the use design or traffic flow of the connection or the state highway. RCW 47.50.080. There were multiple grounds justifying the access modifications throughout the SR 7 corridor. First, many of the properties, including those involved in this case, did not have defined access connection points for driveways. Second, as the Parkland area urbanized, SR 7 experienced a significant increase in traffic volume and operational characteristics.

⁴⁵ At each one of the three administrative hearings, WSDOT presented the same exhibits and put on the same witnesses to support its conclusion that safety issues existed throughout the corridor. While cites to evidence in this section may not consistently be to all three hearings, an examination of the administrative record for each Appellee will show that the exhibits supporting the testimony on the safety issue are the same.

⁴⁶ AR at 300000009 (Galvis Final Order), attached as Appendix 6.

⁴⁷ *Id.*

⁴⁸ AR at 300000011 ¶17 (Galvis).

Commercialization and subdivision of the agricultural property led to a proliferation of access connections along the corridor. These two factors resulted in the unusually high accident rate.⁴⁹ Finally, the SR 7 safety improvement project constituted a design change in the state highway, which required elimination of undefined access connections and redundant access connections. It is impossible to install sidewalks and drainage swales without confining vehicle access to defined driveways.

At each hearing, two professional engineers provided testimony supporting WSDOT's decision to modify the access connections. Project engineer Troy Cowan was the engineer responsible for designing and constructing the safety improvement project.⁵⁰ He testified about the project design generally and the design of the new access connections for each property at issue in this case. Traffic Engineer John Nisbet was responsible for analyzing traffic and safety problems on state highways within the Olympic Region.⁵¹ He testified about the traffic volumes and the accident history in SR 7. Both men testified about the safety and operational problems caused by too many undefined access points.

Before the Superior Court, all owners argued that the evidence showed few accidents occurring in front of their properties, and thus that

⁴⁹ AR at 300000212 (Galvis).

⁵⁰ AR at 300000553-54 (Troy Cowan's curriculum vitae).

⁵¹ AR at 300000556-57 (John Nisbet's curriculum vitae).

access connections did not pose a safety problem. However, the record contains substantial evidence which shows that undefined access, such as that existing on their property, creates unpredictability for traffic entering and leaving SR 7 in this corridor. It further shows that, despite low accident numbers at any particular location, the corridor as a whole experiences an unusually high number of accidents which can be attributed in large part to the corridor-wide undefined access problem.

At each hearing, WSDOT presented testimony regarding how WSDOT studies accident data to determine whether a particular location presents a safety problem. Mr. Nisbet explained that the reason WSDOT uses a corridor-wide approach is that high accident locations in a particular corridor will change from year to year. While one particular location may not be a high accident location one year, it very well could be the next.⁵² He further stated that WSDOT does not focus on data for a particular property when deciding how to regulate a corridor, because the numbers at any particular location are not statistically significant.⁵³ However, when evaluated on a corridor-wide basis and compared to other corridors, valid conclusions regarding relative safety problems can be drawn.⁵⁴

⁵² AR at 300000313 (Galvis).

⁵³ AR at 300000330-331 (Galvis).

⁵⁴ *Id.*

When WSDOT evaluated SR 7 between 1993 and 2002, it found that the number of accidents was more than twice the average for state highways.⁵⁵ The number of accidents along the corridor was increasing at a rate greater than the amount of increased traffic.⁵⁶ Further, between 1993 and 2002, WSDOT concluded from Washington State Trooper accident data that the project corridor either qualified as a high accident corridor (“HAC”) or contained number of high accident locations (“HAL”).^{57 58}

WSDOT also evaluated the project’s costs as compared to its anticipated societal benefit.⁵⁹ Using Federal Highway Administration statistics, it evaluated the societal costs (e.g., insurance, medical costs) of the corridor’s accident rates. It then concluded that a mere 40% reduction in accidents along the corridor would result in an annual savings of approximately \$800,000 per year.⁶⁰

In addition to the corridor-wide evidence of a safety problem, WSDOT presented testimony that the uncontrolled access in front of the Galvis/Moncada and Masewicz properties creates uncertainty for drivers

⁵⁵ AR at 300000315-316 (Galvis); 300000992 (Ash); *See also* AR 300002107-2108 (2002 Accident Rate Comparison: SR 7, MP 47.38-52.52 to Statewide Average).

⁵⁶ *Id.*

⁵⁷ A HAC is a ½ mile stretch of highway which has a greater than state-wide average accident rate. A HAL is a 1/10 of a mile stretch of highway with a greater than state-wide average accident rate. AR at 300000307-08 (Galvis); 300001701-03 (Masewicz).

⁵⁸ AR at 300000310 (Galvis), 300000396 (Galvis); 300001372 (Masewicz).

⁵⁹ AR at 300000993 (Ash); 300001707 (Masewicz); 300002166 (Masewicz).

⁶⁰ *Id.*

along SR 7, which likely contributes to the high number of accidents. Mr. Cowan described the current access to these properties as being “wide open” where vehicles may enter or exit property at any point along the highway frontage.⁶¹ He stated that people can park any way in front of the building, without restriction.⁶² He explained how an undefined access leads to hesitation and poor decision-making by drivers on SR 7:

...with unrestricted access you have vehicles on either approaching or exiting the property that have to make the decision when do I go and where do I go. In other words, a vehicle let's say traveling southbound in the lanes closest to the property, as they approach that property they're slowing down, and they're making a decision is it safe to turn here, is it safe to turn the next 50 feet, is it safe to turn the next 10 feet.

All the meanwhile that indecision is causing vehicles to either hesitate or make poor decisions on entering or exiting this property. If there's a vehicle waiting to come out, main line traffic, in other words, the southbound traffic, they're not sure what that motorist is going to do. They don't know if they're backing up into a parking spot. They don't know if they're entering or exiting the property.⁶³

Mr. Cowan described how vehicles back into highway traffic when exiting the property.

Q [Salmon]: Now, you've been out there and you've observed vehicles entering and leaving the parking spots; is that correct?

⁶¹ AR at 300000236-237 (Galvis).

⁶² *Id.*

⁶³ AR at 300000242-243 (Galvis); 300001682 (Masewicz).

A [Cowan]: Yes.

Q [Salmon]: And can you tell us what sort of movement you observed.

A [Cowan]: It's – it's a scary situation from my standpoint. I stood on the sidewalk and watched the operation. I stood outside this utility pole and watched the operation.

Basically what happens is a vehicle backs out and depending on how busy the – how full the parking lot is, really dictates on how far they have to back out. If there's a vehicle immediately on this side, this vehicle has to back all the way out before it can start its swing. And doing that, it puts itself out into the traffic lane to actually enter back into SR-7 traffic.⁶⁴

Mr. Nisbet supported Mr. Cowan's conclusion that the currently undefined access presents significant safety issues, stating that the current situation failed to meet minimum acceptable standards of highway safety.

When you look at industry standards or access, just from a driveway standpoint, it's basically considered unacceptable. You define the driveway entrance, driveway exists, and you know, that may be one driveway location, but you define a specific location so that there's predictability as you travel down the highway.

And from the standpoint of, in this situation, just the potential for backing out on to [SIC?]] the highway, the slowing that's likely to occur as motorists try to find a – pick their parking spot, which they have to do as they're on the highway in order to know where to turn, those kinds of things I think makes that type of access very, very risky.⁶⁵

⁶⁴ AR at 300000245-246 (Galvis).

⁶⁵ AR at 300000333-334 (Galvis).

Mr. Nisbet also testified that customers backing up while exiting from the undefined access, like that of the Galvis/Moncada and Masewicz properties, slows traffic on SR 7 and can also lead to rear-end accidents.

Q [Salmon] Can you give us some examples of the kind of things you're talking about when you're talking about distractions, and how those things could have an impact on traffic safety.

A [Nisbet] For example, a backing maneuver. When you're backing up in an unrestricted access, a motorist moving down the highway has to anticipate what that car is going to do and react to it basically; you know, make a reaction or determination and react.

And so even – even maneuvers like that that are adjacent to the highway typically end up impacting traffic. Traffic slows in anticipation of what if that vehicle backs out on the highway or enters the highway unexpectedly.

Q [Salmon] And can slowing traffic contribute to accidents on the highway?

A [Nisbet] Yes. That typically contributes to rear end type accidents. And then when you look at a route like SR-7, it tends to be a big number.⁶⁶

While the undefined nature of access presents a safety issue at the Galvis/Moncada and Masewicz properties, it was the number and proximity of access points at the Ash property which presented a safety issue. Although the access to the Ash property is somewhat defined by fencing, consolidation of the two approaches into a single point of access

⁶⁶ AR at 300000300-01 (Galvis).

defined by sidewalks and drainage swales will bring the property into compliance with design standards and increase safety. Reducing the number of decision points leads to less decision points for drivers along SR 7 who are trying to predict from where they can expect traffic to leave and enter the highway.⁶⁷

To summarize, the record includes testimonial and documentary evidence presented at all three administrative hearings that the WSDOT examined accident data for the project's area and concluded that it suffered from almost twice as many accidents as the average number for Washington state highways. The accidents are caused by too many access points and by the undefined access connections. This access creates unpredictability for drivers on SR 7, who then hesitate and slow down at random times which causes an increased potential for accidents.

In all three of the Final Orders, the Reviewing Officer concluded that the undefined access along SR 7 created a safety problem which could be improved by controlling access. This Court should find that substantial evidence exists in the record to support WSDOT's findings of fact on these issues.

⁶⁷ AR at 300000988 (Ash).

B. The Owners Will Have Reasonable Access Upon WSDOT's Implementation of Its Proposed Modifications.

Having concluded that WSDOT had authority to modify the owners' access connections, the Reviewing Officer examined whether the modifications left the owners with reasonable access. In answering this question, the Reviewing Officer considered both whether the modifications will be safe and whether the property owners will have ingress and egress appropriate for the current use of the property. *State v. Calkins*, 50 Wn.2d 716, 718, 314 P.2d 449 (1957); *see* WAC 468-51-020(19). In each case, the Reviewing Officer found that the modifications would provide the owner with reasonable access to SR 7. The remainder of this section discusses the evidence that supported these findings.

1. Galvis/Moncada and Masewicz Reasonable Access Determination.

Because their properties are adjacent and the access modifications will affect the two properties similarly, the Reviewing Officer's findings regarding reasonable access for Galvis/Moncada and Masewicz will be examined together. These properties posed extraordinary design problems caused by the proximity of the buildings to the right-of-way line.⁶⁸ WSDOT engineers listened to the owners' concerns and designed a creative access solution.

⁶⁸ AR at 3000000244 (Galvis).

To evaluate whether an access design will accommodate the type of vehicles using a property, WSDOT engineers use a computer design program. In both hearings, WSDOT provided output diagrams from the program demonstrating that the largest vehicles which currently access the properties will be able to enter and exit each property after the modification.⁶⁹ This conclusion was corroborated by testimony from WSDOT Engineer Troy Cowan that this access is both reasonable in light of the present use of the property and would be safer than the currently uncontrolled access configuration. Further, the Reviewing Officer correctly concluded that the WSDOT's revocation of the owners' unauthorized use of the state right-of-way for parking was irrelevant to the reasonable access determination.

In the Galvis Final Order, the agency Reviewing Officer concluded that the access modifications would provide reasonable access to the property:

Under the SR 7 Improvement project the WSDOT will install sidewalks, curbs, gutters, and concrete driveways. Regarding Appellants' access, the WSDOT abandoned its proposed action described in its September 22, 2003 letter, and shown on a draft design plan attached to the letter. The WSDOT proposes access to the subject property outlined in a design plan attached to this decision and incorporated by reference as Attachment "A". Under this plan the WSDOT plans to install an 11.8 cement concrete

⁶⁹ AR at 300000066-67 (Galvis/Moncada design plan), attached as Appendix 3.

driveway and 26-foot wide approach and a 6-foot cement concrete sidewalk in front Appellants property. The WSDOT will allow use of the state's right-of-way to ingress and egress the property. After the WSDOT's proposed safety project, Appellants will have two parking spaces, where vehicles, when parked, will be located only on appellant's property, and will not also require the use of or be located on state-owned highway right-of-way. Exhibits 41 and 42 represent computer generated turning templates offered by the WSDOT to examine the impact of the improvement upon the property. The project does not unreasonably limit access by any vehicle using the Appellants' property.⁷⁰

Substantial testimony and evidence in the record supports this finding. Referencing WSDOT administrative exhibits 40-42, Mr. Cowan testified that WSDOT designed the approach to allow even the largest vehicles that currently visit the property to continue to be able to do so.

A [Cowan]: Yeah. I think I'll – I'll show Exhibit 40. And what this represents is a way to enter and exit the property. I – I left my pen here somewhere – a way to enter and exit the property. So in other words, we've eliminated the swales in this case, which is unfortunate. We'll have to develop another way to handle storm water, but we can do that.

But we continue to construct our sidewalks. And as we get out in front, there's the requirement for the sidewalk gets wider as you're right next to live traffic, so the sidewalk is actually six feet, as opposed to five feet everywhere else. We construct a roadway approach here. This would be sidewalks to this point, and construct another roadway approach here.

⁷⁰ AR at 300000010-11 (Galvis Final Order), attached at Appendix 6. See also AR at 300001529 (Masewicz Final Order), attached at Appendix 7.

And vehicles would be able to utilize the existing right-of-way or the existing property by La Popular to park within that area between the right-of-way line and the exiting sidewalk. That was Exhibit 40.

Exhibit 41 is the same – the same look, but what it shows is how a delivery truck could come in. Understanding the needs of deliveries for a site like this, we wanted to make sure that deliveries could still be made. So the example we used is what we refer to as an SU vehicle. It's a size of a bus, size of a large panel van, if you will, for getting into and out of the property.

And what this exhibits is that this – with the parking in place, the truck can still come in, make the delivery and move on.

And the following is actually a passenger car, the same exhibit with a passenger car making the same movements in and out of the properties. That is Exhibit 42.⁷¹

In his Finding of Fact No. 15, Review Officer Peterfeso references Exhibits 41-42, which demonstrate that such vehicular access would exist, as persuading him that the access would be reasonable. *See supra* at 28.

Referencing the same exhibits at the Masewicz hearing (exhibits 24B, C and D are the same as Exhibits 40-42 in the Galvis hearing), Mr. Cowan similarly explained that the access modifications would permit the same vehicular access as before of fact:

[Salmon]⁷²...Mr. Cowan finally gave an opinion on whether or not the access provided under the plan depicted in 24 B, C, and D would be reasonable. He said that, in his

⁷¹ AR at 300000255-256 (Galvis).

⁷² Mr. Salmon is recounting Mr. Cowan's testimony for the record because the tape had stopped while he was presenting it.

opinion, it would be reasonable. Let back up just one second. He also showed us 24C, I think is the one with the truck, yes, he showed is [sic] 24C that the WSDOT has essentially determined that a delivery type truck could access the property under the plan set out in 24 B, C and D. Mr. Cowan's opinion on reasonableness of access, is that the access is reasonable, that people can get in and out of the property, they can use the DOT right-of-way to access the property and probably, most importantly, they can get in and out safely, and I believe that was the end of his testimony.

[ALJ Walters]: All right.

[Sinnitt]: Thank you, your Honor, I disagree with Mr. Salmon that Cowan testified that the number of lawful parking spots doesn't change. If the Court will recall, I objected to Mr. Cowan giving a legal conclusion. My objection was sustained. Other than that statement, I believe, Mr. Salmon's narrative fairly summarizes Mr. Cowan's testimony under direct.

Mr. Cowan also testified that he believed the proposed access modifications would create a safer situation than what currently exists:

Q [Mr. Salmon]: And is this situation safer than what you've got there now?

A [Mr. Cowan]: Absolutely. In my opinion, the vehicles are going to – are going to be separated from the line of traffic. There will be maneuvering within – they will be maneuvering within the right-of-way, but that separation with the sidewalk in between live traffic on main line SR-7, State Route 7, and the property is absolutely a safer condition.⁷³

Mr. Nisbet echoed and elaborated upon this opinion:

⁷³ AR at 300000257 (Galvis).

Q [Salmon] And in your opinion, will this safety project improve the safety of this stretch of highway?

A [Nisbet] I think it will. And I think the research tells you it will. The things like the access management implementation – the implementation of access management, the way we're doing it through the corridor, will provide accident reduction.

I think that signal modifications are going to help us reduce accidents at the concentrated areas. Pedestrian improvements that are being made out there, you know, the sidewalks, both from a pedestrian standpoint, as well as by the driveways and the access management aspects of it. There are other pedestrian amenities or treatments that reduce the risk of pedestrian accidents occurring out there. The illumination system is going to reduce the night time – the numbers of accidents occurring at night.

All those things in combination, which is a typical approach to a highway like this. It's not one magic bullet improvement that you can go do that's going to make things, you know, everything better. It's typically a combination of improvements.⁷⁴

The testimony and the underlying exhibits provides substantial evidence supporting the Reviewing Officer's finding that the Galvis/Moncada and Masewicz properties will have reasonable access under the WSDOT's proposed access modification plans. The court should affirm the Reviewing Officer's finding of fact.

⁷⁴ AR at 300000332-333 (Galvis).

2. The Owners Are Not Entitled to Utilize Public Right-of-Way for Parking.

The proximity of the Galvis/Moncada and Masewicz building to the highway right-of-way made design of safe access connections very challenging. The fundamental problem was locating enough parking space in the limited area. However, WSDOT designers devised a clever solution which allows the poorly designed buildings to function. Nonetheless, these owners complain that the modification will reduce the number of parking spaces. In reality though, the parking spaces currently used by the owners are located on the state right-of-way. The owners do not have a right to use WSDOT property for that purpose. RCW 47.32.120 provides:

“it is unlawful for any person to erect a structure or establishment or maintain a business, the nature of which requires the use by patrons or customers of property adjoining the structure or establishment unless the structure or establishment is located at a distance from the right of way of any state highway so that none of the right of way thereof is required for the use of the patrons or customers of the establishment.”

This statute provides WSDOT with authority to erect a fence to prevent further unauthorized use of the right-of-way. *Id.* The owners’ buildings are located so close to the state right-of-way that customers, suppliers and tenants are forced to park on the right-of-way in violation of RCW 47.32.120. In place of a fence and in conjunction with a safety

improvement project, WSDOT is installing sidewalks that will prevent further unauthorized use of the right-of-way.

Washington courts have long recognized that the use of the right-of-way is a revocable privilege. *State v. Williams*, 64 Wn.2d 842, 394 P.2d 693 (1964) (parking on the right-of-way is a privilege, not a compensable right in a condemnation action); *Billington Builders Supply v. Yakima*, 14 Wn. App. 674, 676-677, 544 P.2d 138 (owner of property abutting a public way had no right to on-street parking); *see also Showalter v. City of Cheney*, 118 Wn. App. 543, 550, 76 P.3d 782 (2003) (no right to compensation for city-mandated removal of awning that had been allowed by license to rest on public sidewalk). Reclaiming the state's right-of-way does not alter the number of legal parking spots on the owners' property. Because the owners have no right to use the state right-of-way for parking, the termination of their illegal use should not affect the reasonable access determination.

3. Ash Reasonable Access Determination.

The situation at the Ash property is quite different than the Galvis/Moncada and Masewicz properties. The Ash property is essentially undeveloped with about 430 feet of highway frontage and

alternative access to a county road.⁷⁵ The existing access connections are not formally defined by curbs or driveways, but there is fencing on the property that provides some definition.⁷⁶

The problem with the existing access to the Ash property is that there are too many access points. WSDOT design standards call for one access point per property and a minimum of 330 feet between access connections.⁷⁷ The two access points on the Ash property exceed this standard. WSDOT's proposed modification left the property with a single access connection. However, the new connection was 50-feet wide and capable of handling four lanes of traffic. The single point had the same capacity as the previous two points.

The agency Reviewing Officer affirmed the ALJ's conclusion that the modifications to the Ash property access would help address the safety issue that existed throughout the corridor:

*The WSDOT's SR 7 Safety Improvement Project will install sidewalks, curbs, gutters, and concrete driveways. The undersigned finds that the structures will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route which includes the Ash Resources property. Pedestrians will be safer along designated sidewalks and crossing. Lightening [sic] will be installed to enhance safety. Traffic signals will regulate the flow of traffic.*⁷⁸

⁷⁵ AR at 300001006 (Ash); 300000970 (Ash)

⁷⁶ AR at 300001405, 1407 (Ash photos), attached as Appendix 4.

⁷⁷ AR at 300001000-01 (Ash).

⁷⁸ AR at 300000887 (Ash).

The Reviewing Officer further concluded that the property would continue to have reasonable access if WSDOT implemented its proposed modifications:

I find that the WSDOT's proposal to provide that an access permit be issued authorizing a 50-foot wide driveway does not unreasonably limit the 40-foot and 50-foot long semi trucks and trailer combinations that use the subject property. The delivery trucks that currently patronize the premises could continue to access the premises. The Appellant's property will have reasonable vehicle access after the implementation of the project's improvements.⁷⁹

Id. at 300000888. Testimony from Engineers Troy Cowan and John Nisbet supports this finding. When asked their opinions on this issue, both engineers testified that they thought the access would be reasonable:

Q [Dietrich]: Now, do you have an opinion as to whether the WSDOT's proposal for eliminating one access connection will leave the Ash property with reasonable access?

A [Cowan]: Yeah, I definitely believe this will leave reasonable access. There is lots of room for maneuverability within the site. The elimination of one access shouldn't detract from the overall site.

Q [Dietrich]: Is the access connection that you are proposing wide enough to accommodate a semi-truck?

A [Nisbet]: Yes, it is.

Q [Dietrich]: And how many lanes – you leave a 40-foot access, but how many lanes would that accommodate?

⁷⁹ AR at 300000888 (Ash).

A [Nisbet] Well, for example, our lanes out on SR-7, State Route 7 are 12 feet wide. So if you applied that times three you are at 36 feet. Even if you went to 13-foot lanes you are looking to accommodate three lanes.

Q [Dietrich]: So 40-foot—this 40-foot⁸⁰ connection could accommodate three – a total of three lanes?

A [Cowan] Yes.⁸¹

Mr. Nisbet concurred with Mr. Cowan's conclusion.

Q [Dietrich]: Do you have an opinion whether the proposal that the WSDOT has which is for a single 40-foot-wide commercial approach, whether that would leave the property with reasonable access?

A [Nisbet]: Yes, I believe it would leave the property with reasonable access.

Q [Dietrich]: And why is that?

A [Nisbet]: Well, from the standpoint of the ability to enter and exit off of the highway that one 40-foot wide access should accommodate the traffic entering and exiting from that site. And from a [sic] access management standpoint it provided the benefits associated with implementing access management.

Q [Dietrich]: Do you have an opinion whether or not reducing it from two access points to a single driveway would increase the backup of cars on the highway waiting to enter the property?

A [Nisbet] Reduce – that reduction really shouldn't. I think what – what we often see, and this, I guess, is in general,

⁸⁰ The proposal was originally for a 40-foot access point, but during the course of the hearing the WSDOT agreed to expand it to 50-feet. Assuming 12-foot widths, this is equivalent to four highway lanes of traffic.

⁸¹ AR at 300000957 (Ash).

that what impacts backups onto a highway are two things. One, just sheer volume. So when you are talking about a high access—a high volume, typically you are talking about a public road intersection; the volume itself. But those are – that’s a high volume of traffic that would do that. Otherwise it often has more to [do] with how clear – you move into the access itself, how clear direction is in how to proceed into the site. And so you oftentimes see histation once the cars – that first car has actually entered the property in terms of where to proceed forward onto the site.

Otherwise, overall, again from an access management standpoint and an accident reduction standpoint, what you try to achieve is reducing the number of access points to reduce the number of conflict points, to simplify driver behavior and driver expectations.⁸²

In sum, the ability of vehicles currently accessing the Ash property will not change after WSDOT consolidates the two existing 25-foot approaches into a single 50-foot approach. Further, the owners can obtain access to 184th Ave. if they desire. The evidence in the record supporting these conclusions amounts to substantial evidence supporting the Reviewing Officer’s finding that the property will have reasonable access after WSDOT’s implementation of its proposed changes. The court should affirm the Reviewing Officer’s finding.

VII. CONCLUSION

Each access modification is legally justified for multiple reasons. Each access modification increases safety, is consistent with current

⁸² AR at 300000996-97 (Ash).

design standards and respects the owners' right to reasonable access. WSDOT respectfully requests that the court vacate Judge pro tem Thompson's order and affirm the WSDOT's findings of fact and conclusions of law set out in the final orders.

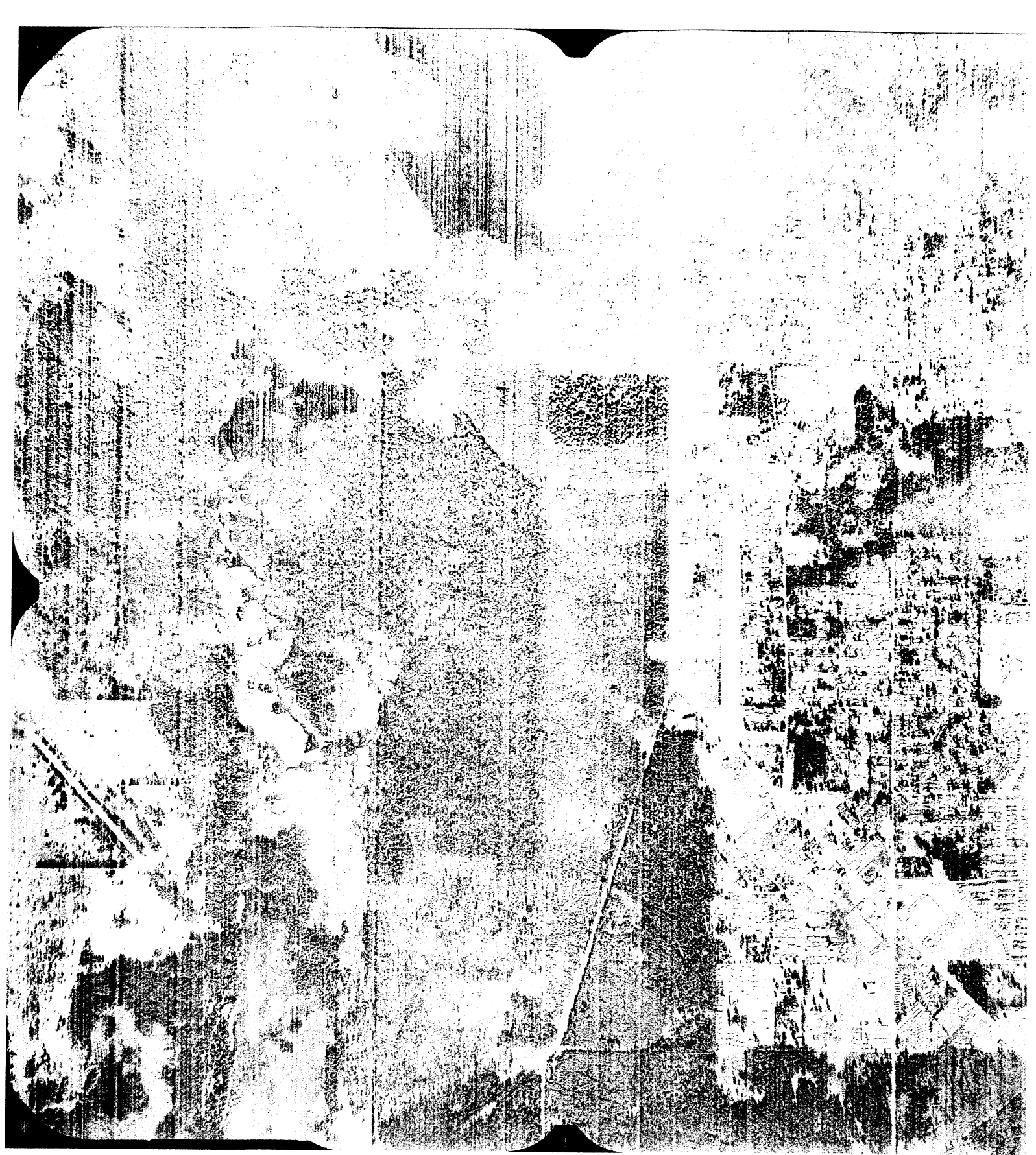
RESPECTFULLY SUBMITTED this 25th day of August, 2006.

ROB MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'Douglas D. Shaftel', written over a horizontal line.

DOUGLAS D. SHAFTEL
Assistant Attorney General
WSBA# 32906
Attorney for Appellant/Cross
Respondent

APPENDIX 1



WSDOT - 01

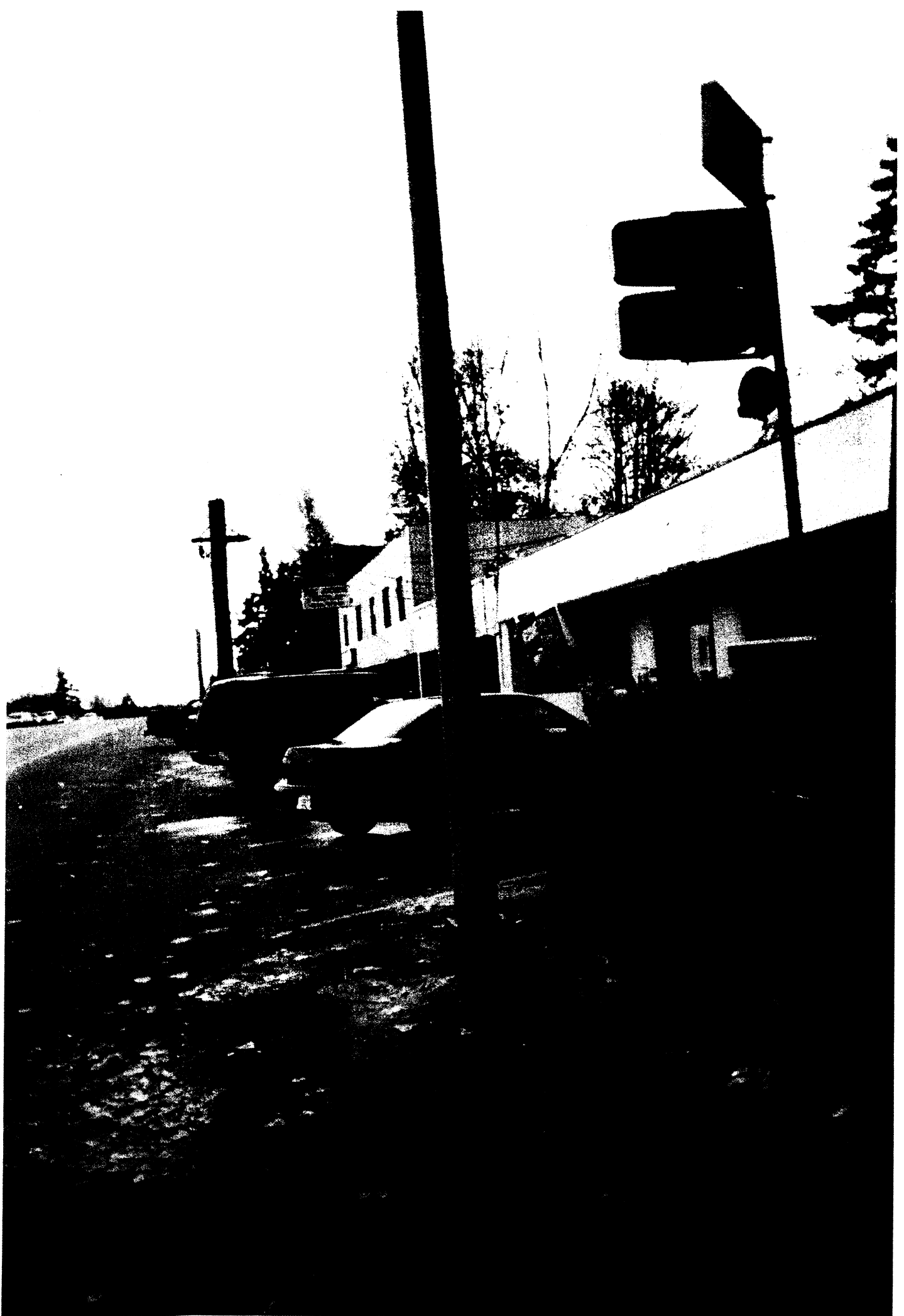
GALVIS DOT
300001179

APPENDIX 2











GALVIS DOT
300000769



GALVIS DOT
300000770



GALVIS DOT
300000771

WSDOT - 25



WSDOT - 26

GALVIS DOT
300000772

APPENDIX 3

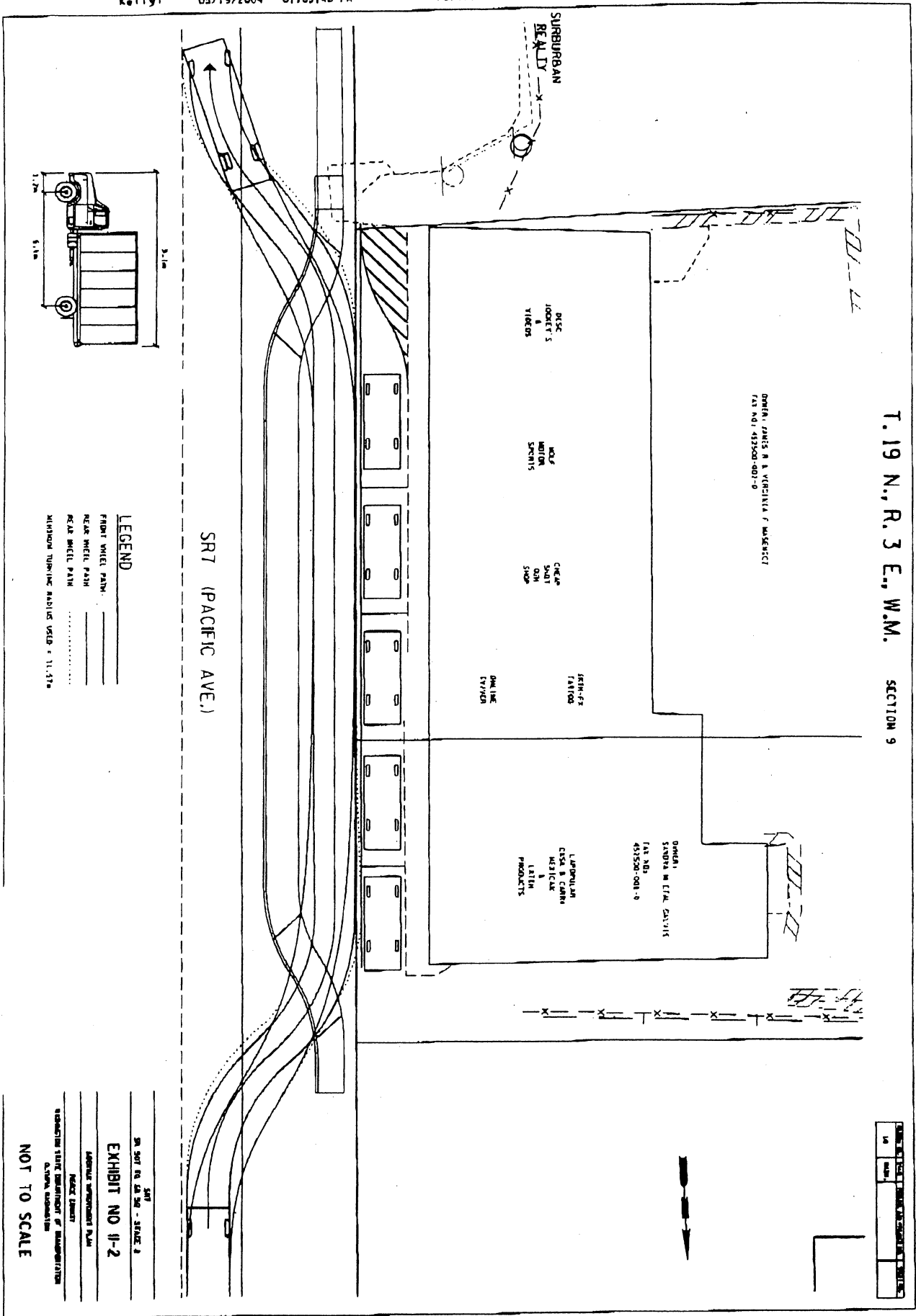
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T. 19 N., R. 3 E., W.M. SECTION 9

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NOT TO SCALE

EXHIBIT NO 11-2

ADDITIONAL INFORMATION PLANS

INDEX SHEET

REVISIONS STATE DEPARTMENT OF TRANSPORTATION

DATE OF REVISION

GALVIS DOT
3000000066

APPENDIX 4



GALVIS DOT
300001405

WSDOT -30



WSDOT -32

GALVIS DOT
300001407

APPENDIX 5

T. 19 N., R. 3 E., W.M. SECTION 33

SECTION NO.	STATE	PROJECT NO.	SHEET NO.
10	WASH.		



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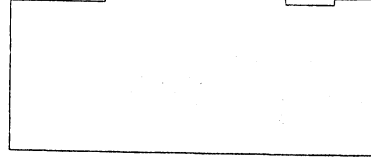
12M/39.4'

10'
3.3M TEMPORARY CONSTRUCTION PERMIT

G. E. BARR, JR. AND SONS, INC.

PROPERTY OF G. E. BARR, JR. AND SONS, INC.

PROPERTY OF G. E. BARR, JR. AND SONS, INC.



EXISTING SR7 RIGHT OF WAY
EXISTING CURB LINE
PROJECT CENTERLINE
PROPERTY BOUNDARY LINES
EDGE OF LANES AND EDGE OF SHOULDER
EXISTING FENCE

CEMENT CONCRETE SIDEWALK
CEMENT CONCRETE DRIVEWAY APPROACH
GRASS LINED DRAINAGE DITCH
EXISTING RIGHT OF WAY

SR7

SR 507 TO SR 502 - STAGE 2

EXHIBIT #1-10

SIDEWALK IMPROVEMENT PLAN

PERCE COUNTY

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
OLYMPIA, WASHINGTON

NOT TO SCALE

WSDOT - 02

GALVIS DOT
300001180

APPENDIX 6

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6
7 BEFORE THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

8 In the matter of :

NO. OAH No. 2003-DOT-0021

9 SANDRA M. GALVIS & ALEXANDER
10 MONCADA,

FINAL ORDER

11 Appellants

12 v.

13 STATE OF WASHINGTON,
14 DEPARTMENT OF
TRANSPORTATION,

15 Respondent

16 The reviewing officer, Harold Peterfeso, P.E., State Design Engineer for the
17 Washington State Department of Transportation, having considered the record created by
18 Administrative Law Judge Selwyn S.C. Walters, and also considering: (1) Appellants'
19 Petition for Review of Findings of Fact, Conclusions of Law and Initial Order of Hearing
20 Conducted on June 10 & 11, 2004 before ALJ Selwyn S.C. Walters, and (2) Respondent's
21 Reply Brief,

22 ORDERS AS FOLLOWS:

23 1. The Findings of Fact, Conclusions of Law and Initial Order, dated September
24 24, 2004, in the above entitled matter is affirmed and is attached hereto and incorporated in its
25 entirety by this reference, except for the amendments and corrections following:
26

FINAL ORDER

1

GALVIS DOT
300000001

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
905 Plum Street, Building 3
PO BOX 40113
Olympia, WA 98504-0113
(360) 753-6126 Facsimile: (360) 586-6847

1 a. Finding of Fact 3 – Amend “Marked on the Appellants’ property and
2 the state’s right-of-way are parking spaces for six vehicles” to read: Before the Department’s
3 proposed SR 7 safety project, Appellants use six spaces for parking vehicles; however, the
4 vehicles, when parked, are located both on Appellants’ property and on state-owned highway
5 right of way.

6 b. Finding of Fact 4 – Amend “The SR 7 roadway in front of the
7 Appellants’ property consists of two lanes of traffic on either side of the centerline” to read:
8 The SR 7 roadway in front of Appellants’ property consists of two lanes of traffic on either
9 side of a two-way left turn lane in the center.

10 c. Finding of Fact 5 – Correct 1988 to read: 1977.

11 d. Finding of Fact 8 – Insert after 2nd sentence: For example in 2002, the
12 SR 7 five-mile corridor had 6.41 collisions per million vehicle miles, whereas the state
13 average for similar highway sections was 2.56 collisions per million vehicle miles.

14 e. Finding of Fact 9 – Correct 368-51 to read: 468-51.

15 f. Finding of Fact 15 – Amend “...11.8 foot cement concrete driveway
16 approach...” to read: ...11.8 foot cement concrete driveway and 26 foot wide approach....,
17 and Amend “This configuration eliminates all but two spaces for vehicular parking at the
18 business” to read: After the Department’s proposed safety project, Appellants will have two
19 parking spaces, where vehicles, when parked, will be located only on Appellants’ property,
20 and will not also require the use of or be located on state-owned highway right of way.

21 g. Finding of Fact 17 – Amend “Without a doubt, the Appellants will
22 loose (sic) spaces they previously used for parking” to read: Appellants will no longer be able
23 to use state-owned highway right of way for business and tenant parking purposes.

24 h. Conclusion of Law 10 – Correct “...11.8 foot cement concrete
25 driveway approach...” to read: ...11.8 foot cement concrete driveway and 26 foot wide
26 approach....

1 i. Conclusion of Law 11 – Amend “Under the plan that I conclude is
2 reasonable, the Appellants will loose (sic) spaces they previously used for parking. The fact
3 that the Appellants loose (sic) spaces they used for parking, and do not have the particular
4 access they believe necessary does not make the access unreasonable” to read: Under the plan
5 that I conclude is reasonable, the fact that Appellants will no longer be able to use state-owned
6 highway right of way for parking purposes and the fact that Appellants do not have the
7 particular access that they believe is necessary does not make Appellants’ access
8 unreasonable.

9 j. Conclusion of Law 12 – Amend “The loss of property where the
10 Appellants’ customers parked their vehicles was not the Appellants’ property. Not being able
11 to use that property for parking does not make the Appellants’ access unreasonable. The
12 Appellants parking spaces have been reduced from six to two” to read: Part of the property
13 upon which Appellants’ customers parked their vehicles was not the Appellants’ property, but
14 instead, the property was state-owned highway right of way which will now be used for the
15 SR 7 highway safety project. Not being able to use state-owned highway right of way for
16 parking does not make the Appellants’ access unreasonable. The Appellants will retain room
17 that they previously had for two lawful parking spaces located on their property.

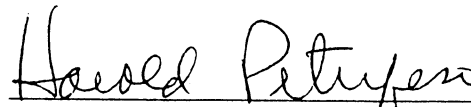
18 2. Appellants Sandra M. Galvis and Alexander Moncada will have reasonable
19 access to and from State Route 7 pursuant to the Department’s access design, referenced as
20 Attachment A and attached and incorporated by this Final Order, which provides for the
21 construction of an 11.8 foot cement concrete driveway, a 26 foot wide approach, and a 6 foot
22 cement concrete sidewalk on SR 7 highway right of way in front of Appellants’ property and
23 which also allows Appellants’ use of the state’s right of way for property ingress and egress.

24 3. Pursuant to RCW 34.05.470, any party may request reconsideration of this
25 Final Order within ten (10) days of the date that the Final Order is served. Specific grounds
26 for reconsideration must be stated in the request. No petition for reconsideration will stay the

1 effect of this Final Order. The filing of a petition for reconsideration is not a prerequisite for
2 judicial review, and an order denying reconsideration is not subject to judicial review.

3 4. Pursuant to RCW 34.05.542, a petition for judicial review of this Final Order
4 shall be filed with the court and served on the agency, the office of the attorney general, and
5 all other parties of record within thirty (30) days after service of this Final Order.

6 DATED this 30TH day of December 2004.

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10 HAROLD PETERFESO, P.E., Reviewing Officer
11 State Design Engineer
12 Washington State Department of Transportation
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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF TRANSPORTATION

MAILED
AUG - 9 2004
OLYMPIA OAH

In the Matter of:

SANDRA M. GALVIS &
ALEXANDER MONCADA

Appellants.

v.

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Respondent.

)
) OAH Docket No. 2003-DOT-0021
)

)
) **FINDINGS OF FACT,**
) **CONCLUSIONS OF LAW AND**
) **INITIAL ORDER**
)

RECEIVED

STATEMENT OF THE CASE

On September 22, 2003, the Washington State Department of Transportation (Department) served a notice on the Appellants, Sandra Galvis and Alexander Moncada. The notice informs the Appellants that a transportation safety improvement project along State Route (SR) 7, Pierce County, requires the Department to change direct vehicular access to SR 7 from their property.

The Appellants requested a hearing to challenge the Department's action on October 21, 2003.

The matter came before Administrative Law Judge Selwyn S. C. Walters for a full hearing on June 10 and 11, 2004, at the Office of the Attorney General, 1019 Pacific Avenue (The Washington Building), Tacoma, Washington. Assistant Attorney General, John Salmon, represented the Department of Transportation. Robert A. Wright, Esquire,

represented the Appellants. Karen Horn translated the proceeding into the English and Spanish Languages.¹

Troy Cowan, a project engineer, and John Nisbet, a traffic engineer, both with the Department, presented testimony for the Department. The Appellants, Sandra Galvis and Alexander Moncada, and Edward O. Greer, a real estate appraiser, presented testimony for the Appellants. The undersigned admitted to the hearing record Department Exhibits 1a through 45 and Appellants Exhibits A through K.

The undersigned, having considered the evidence and the testimony, now enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Appellants, Sandra Galvis and Alexander Moncada, are the owners of a parcel of property located on the west side of State Route (SR) 7 at mile post 52.282, Pierce County, Washington. The size of the parcel is approximately 11, 246 square feet. The parcel extends 182.8 feet sloping steeply westward to 3rd Avenue and Lafayette Street. A building approximately 2,352 square feet constructed circa 1950 is located on the parcel. Over the past fifty-four years previous owners have used the building for business purposes and their customers have parked their vehicles in front of the building on the owners' property and on the state's right-of-way.

2. The Appellants purchased the improved property on April 1, 2002, and operate *La Popular Cash & Carry Market*, a retail business specializing in *latinoamericano* products and services. The business continues to grow and has seen an increase in it's

¹ The Appellants may reach Ms. Horn for a translation of this decision at telephone number (360) 456-6901.

customer base. Because of the steep grade of the westward slope of the parcel customers and suppliers can only enter the business from SR 7. Customers, suppliers, and salespeople arrive at the business in a variety of vehicles including pick-up trucks, vans, delivery trucks, and cars. Customers and suppliers arriving in their motor vehicles encroach on the shoulder or right-of-way of SR 7 to park their vehicles on the Appellants' property and the state's right-of-way.

3. The property is configured so that vehicles may enter and leave *La Popular* along the entire frontage with SR 7. The property has approximately 61.52 feet of SR 7 frontage. Marked on the Appellants' property and the state's right-of-way are parking spaces for six vehicles. The property has no curbs, driveways, or other structures to define the particular access point to *La Popular*. The property just merges into the shoulder of the roadway and then into SR 7.

4. State Route 7 (also referred to as Pacific Avenue) is a class IV state highway carrying vehicular traffic north-south between the neighborhoods of Parkland and Spanaway, and the city of Tacoma. At the time SR 7 was built the area was primarily rural. It is now urbanized. The SR 7 roadway in front of the Appellants' property consists of two lanes of traffic on either side of the centerline. The pavement in front of the Appellants' property is flat and is 8.5 feet from the state's right-of-way. The state acquired the 20 feet right-of-way in 1928. Storm water is handled in underground pipes.

5. The state legislature created the Department of Transportation in 1988 by consolidating the functions of the department of highways, the state highway commission, the director of highways, and other scattered agencies dealing with transportation. See, Laws of 1988 c 167 §§ 11, Laws of 1977 ex.s. c 151 §§ 3.

6. Since at least 1998 the Department designed a project to improve safety along a five-mile segment of roadway on SR 7 between SR 507 (the Roy Y) and SR 512. The Department's proposal responded to concerns about safety. The name of the project is "SR 7 Safety Improvement Project." The Department intends to construct throughout the project limits driveways, sidewalks, drains, signal systems, bicycle lanes, and street lights. The Pierce County government and other local governments may also add landscaping and other complementary features to the project.

7. On September 22, 2003 the Department sent a notice and a draft design to Appellant, Sandra Galvis, and others, informing them of the SR 7 Improvement Project and the action the Department intended to take regarding access from their property to SR 7. The Department's letter provides in relevant part as follows:

Our research for this project has determined that the business on your property currently uses the state right-of-way for parking. Our construction of the proposed sidewalks, drainage ditches and other improvements will require the utilization of the existing state right-of-way. After we construct the proposed improvements as shown on the enclosed plans, you will no longer be able to use the state right-of-way for parking. For your information state law, RCW 47.32.120, generally prohibits the use of state highway right-of-way by business patrons or customers.

We have determined that it is not practicable or safe to provide direct vehicular access to State Route 7 from your property, because there would be no place vehicles leaving the highway to park. Should you make improvements or modifications to your property that would accommodate parking or otherwise enable safe vehicular access, your property may become eligible for a permit allowing a direct access to State Route 7.

.....

8. The Department classifies the five mile stretch of SR 7 a "high accident corridor". The Department defines "high accident corridor" as a highway, one or more miles long, that has a higher accident rate and more severe accidents over a period of time

(usually four years) in comparison to similar highways throughout the state. Within high accident corridors the Department identifies "hazardous accident locations." Hazardous accident locations are less than one mile long (usually 1/10 of a mile) that have a higher than average rate of severe accidents during a two year period. Every biennium from 1993 through 2003 the Department has classified as a hazardous accident location a stretch of roadway within which the Appellants' property is located.

9. The Department intends to modify access and egress to Appellants' property along the highway pursuant to current highway access management laws, chapter 47.50 Revised Code of Washington (RCW), and chapters 368-51 and 468-52 Washington Administrative Code (WAC).

10. The Department recorded approximately 400 accidents per year along the five mile long segment of SR 7 it intends to improve. The accidents are predominantly "angle" and "rear-end" accidents. "Angle" accidents involve a vehicle entering or exiting the highway dealing with access points. "Rear end" accidents are usually associated with congestion or access points.

11. The segment of SR 7 at issue in this case has random access or undefined access because it has full-frontage access to SR 7. There are no defined driveways or structures to limit vehicle access to certain points of entry or exit off of the highway. The Department determined that such undefined or full-frontage access properties pose a traffic safety problem. Vehicle movement is unpredictable either entering or leaving the property when there is full-frontage access. Pedestrians are more at risk with undefined access and exit sites.

12. The Department identified a number of problems with the SR 7 segment that it believed contribute to the "hazardous accident" rating. The first problem includes the full-frontage access or undefined ingress and egress to the property and business. Secondly, the road has no sidewalks which is more dangerous for pedestrians.

13. In addressing the identified safety problem, the Department relied on well accepted published studies that support the view that reducing the number of access points along a highway reduces accidents by up to 40%. Similarly, the concept of defining access points by constructing driveways is a generally accepted means of improving highway safety and has long been a part of the Department's design standards.

14. Although the data shows in three years there was one accident directly in front of the Appellants' property (that is, at mile post 52.282), there were no injury accidents over a ten year period, and most of the accidents occurred in the north bound lanes, the Department designated the entire five-mile a "high accident corridor". The average daily traffic volume along the section of SR 7 encompassing the Appellants' property increased from 39,000 to 43,000 between the years 1997 through 1999.

15. Under the SR 7 improvement project the Department will install sidewalks, curbs, gutters, and concrete driveways. Regarding Appellants' access, the Department abandoned its proposed action described in its September 22, 2003 letter, and shown on a draft design plan attached to the letter. The Department proposes access to the subject property outlined in a design plan attached to this decision and incorporated by reference as Attachment "A". Under this plan the Department plans to install an 11.8 foot cement concrete driveway approach and a 6 foot cement concrete sidewalk in front of Appellants' property. The Department will allow use of the state's right-of-way to ingress and egress

the property. This configuration eliminates all but two spaces for vehicular parking at the business. Exhibits 41 and 42 represent computer generated turning templates offered by the Department to examine the impact of the improvements upon the property. The project does not unreasonably limit access by any vehicle using the Appellants' property.

16. The undersigned finds that a cement concrete driveway approach and cement concrete sidewalk will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route and the Appellants' property. Pedestrians will be safer along designated sidewalks.

17. Prior to the implementation of the Department's project improvements there were no defined driveways, sidewalks, or structures to limit vehicle access to certain points of entry or exit off the highway and Appellants' property. Such undefined, full-frontage access pose a traffic safety problem. Vehicle movement is unpredictable, and pedestrians are more at risk. The Appellants' property will have reasonable vehicle access after the implementation of the project's improvements. Without a doubt, the Appellants will lose spaces they previously used for parking. However, the Appellants' use of the state's right-of-way for parking was not permitted or otherwise authorized by the Department.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the persons and subject matter of this case pursuant to chapter 34.05 RCW (the Administrative Procedure Act), and WAC 468-51-160.

2. The Washington State Department of Transportation regulates vehicular access and connections to or from the state highway system in order to protect the public health, safety, and welfare. RCW 47.50.030. The Washington State Legislature found

that uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system. RCW 47.50.010 (1) (b). The development of an access management program will enhance the development of an effective transportation system and increase the traffic-carrying capacity of the state highway system and thereby reduce the incidences of traffic accidents, personal injury, and property damage or loss. RCW 47.50.010 (1) (c).

3. The public policy of the state announced by the Legislature at chapter 47.50 RCW (the Access Management law) provides the access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a safe and efficient highway system; and that every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property. RCW 47.50.010(3). RCW 47.50.010(4) continues to emphasize that the purpose of the highway access management law is to provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the findings and public policy announced by the Legislature. The Department issued rules to implement the provisions of chapter 47.50 RCW.

4. WAC 468-52-040 establishes an access control classification system consisting of five classes. The classes are arranged from the most restrictive, class one, to the least restrictive, class five. This access control classification system does not include highways that have been established as limited access highways in compliance

with chapter 47.52 RCW. SR 7 is a class four highway for access management purposes. WAC 468-52-040(4).

5. The Department's rules related to the closure or alteration of existing access connections are set out at WAC 468-51-130 and provides:

Any unpermitted connections to the state highway system which were in existence and in active use consistent with the type of connection on July 1, 1990, shall not require the issuance of a permit and may continue to provide connection to the state highway system, unless the property owner had received written notification initiating connection closure from the department prior to July 1, 1990, or unless the department determines that the unpermitted connection does not meet minimum acceptable standards of highway safety and mobility based on accident and/or traffic data or accepted traffic engineering criteria, a copy of which must be provided to the property owner and/or permit holder and tenant upon written request. The department may require that a permit be obtained if a significant change occurs in the use, design, or traffic flow of the connection or of the state highway. If a permit is not obtained, the department may initiate action to close the unpermitted connection point in compliance with RCW 47.50.040. Any unpermitted connection opened subsequent to July 1, 1990, is subject to closure by the department.

6. Relatedly, at RCW 47.50.090(3) (d), access management standards shall include, but not be limited to, connection location standards, safety factors, design and construction standards, desired levels of service, traffic control devices, and effective maintenance of the roads.

7. In this case, the number of customers who arrive by motor vehicle to patronize *La Popular* continue to grow. There are no defined driveways, sidewalks, or structures to limit customers' vehicle access to certain points of entry or exit off the highway and Appellants' property. Vehicle movement is unpredictable, and pedestrians are at risk. The Department properly designated the entire five-mile a "high accident corridor" and identified along the corridor "hazardous accident locations". The evidence shows the average daily traffic volume along the section of SR 7 encompassing the

Appellants' property increased from 39,000 to 43,000 between the years 1997 through 1999, and the Department recorded approximately 400 accidents per year. The evidence shows the Appellants' property is located within that segment of SR 7 the Department has designated since 1993 as a hazardous accident location.

8. Accordingly, I conclude the increase traffic flow, the high rate of accidents, the absence of driveways and sidewalks, and the high accident corridor and hazardous accident location designation, are a significant change in the use, design, and traffic flow of SR 7 and the Appellants' property.

9. The state's established public policy is to protect the citizen's health, safety and welfare by regulating access to state highways. SR 7 has grown from a country road to a busy highway through an urbanized area. WAC 468-52-060 promotes highway uniformity and continuity and requires the undersigned to consider the five mile segment of SR 7 as one unit, not discreet and separate parts identified by a certain number of accidents. Attaching a different characterization to every distance, whether a mile or less, based on the number of accidents in that discreet distance is unreasonable and unsafe, and is not supported by the access management law or the Department's rules. It is possible less accidents occurred on the roadway directly in front of the Appellants' property, or that more accidents happen at one place than another. However, the five mile segment should be planned and improved with uniformity because the evidence supports the Department's designation of the roadway as a high accident corridor, and a stretch of roadway within which the Appellants' property is located as a hazardous accident location. *See*, WAC 468-52-060.

10. The undersigned concludes that the Appellants' property will have reasonable access under the SR 7 Safety Improvement Project. The Department's proposed access to the subject property is outlined more fully in Attachment "A" attached to this decision and incorporated by reference. The Department will install an 11.8 foot cement concrete driveway approach and a 6 foot cement concrete sidewalk on SR 7 in front of Appellants' property. The Department will allow use of the state's right-of-way to ingress and egress the property. A cement concrete driveway approach and cement concrete sidewalk will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route and the Appellants' property. Pedestrians will be safer along designated sidewalks.

11. Under the plan that I conclude is reasonable, the Appellants will lose spaces they previously used for parking. The fact that the Appellants lose spaces they used for parking, and do not have the particular access they believe necessary does not make the access unreasonable. Here the Appellants use the state's right-of-way for parking without authorization from the Department. Absent a lease, license, or permit from the Department an adjoining owner is not authorized to use the state's right-of-way. See, WAC 468-30-110, and generally, chapter 468-34 WAC. A property owner may not acquire an interest in state highway property by adverse possession. See, e.g., *State v. Scott*, 89 Wash 63, 76, 154 Pac. 165 (1916); *Mueller v. Seattle*, 167 Wash. 67, 75, 3 P.2d 994 (1932).

12. Further, the Appellants' right to have their desired access is subordinate to the public's right to a safe and efficient highway. The Appellants will not have to use any of their property or pay for any of the improvements. The loss of property where the Appellants' customers parked their vehicles was not the Appellants' property.

Not being able to use that property for parking does not make the Appellants' access unreasonable. The Appellants parking spaces have been reduced from six to two. They believe this will adversely affect their business. The undersigned does not minimize the difficulty the reduced parking spaces may have on the Appellants' ability to attract customers, and the overall impact on their business. But growth and development have made the area unsafe for vehicular and pedestrian traffic. A cement concrete driveway approach and cement concrete sidewalk will improve highway safety.

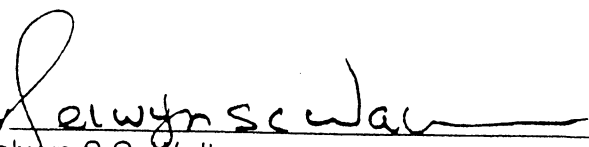
13. I conclude the Department's plan provides reasonable access for the Appellants' property and adds a safe and well planned road with a defined traffic flow for drivers and pedestrians, and is in the best interest of the public all around.

ORDER

NOW THEREFORE the proposed agency action installing an 11.8 foot cement concrete driveway approach and a 6 foot cement concrete sidewalk on SR 7 in front of Appellants' property, and allowing use of the state's right-of-way to ingress and egress the property, which plan is depicted in a design attached and incorporated in this decision as Attachment "A" is **HEREBY ORDERED AFFIRMED**. This appeal is **ORDERED DISMISSED**.

Dated at Olympia, Washington, on the date of mailing.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

By 
Selwyn S.C. Walters
Administrative Law Judge
2420 Bristol Court SW
PO Box 42489
Olympia, Washington 98504-2489

NOTICE TO PARTIES

This Initial Order may be appealed pursuant to the Administrative Procedures Act, chapter 34.05 RCW and WAC 468-10-520. If no appeal is served on the Washington State Access and Hearing Engineer, Transportation Building, PO Box 47329, Olympia, WA 98504-7329, within 20 days of the date this Initial Order was mailed to you this Initial Order becomes final.

Attachment

Copies mailed to:

Appellant:

Sandra M. Galvis & Alexander Moncada
11214 Pacific Ave S #1121
Tacoma WA 98444
Telephone (253) 377-0100 (cell)

Appellant Representative:

Robert A. Wright, Attorney at Law
5920 - 100th St SW, Ste 25
Lakewood WA 98499
Telephone (253) 581-0660

Assistant Attorney General:

John Salmon, Assistant Attorney General
Office of the Attorney General
Transportation & Public Construction Division
PO Box 40113
Olympia WA 98504-0113
Telephone (360) 753-1622

Interpreter:


Karen Horn
7627 Ostrich Dr SE
Olympia WA 98513
Telephone (360) 456-6901

cc: Barbara Cleveland, OAH

STATE OF WASHINGTON)
)
COUNTY OF THURSTON) ss.

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent.

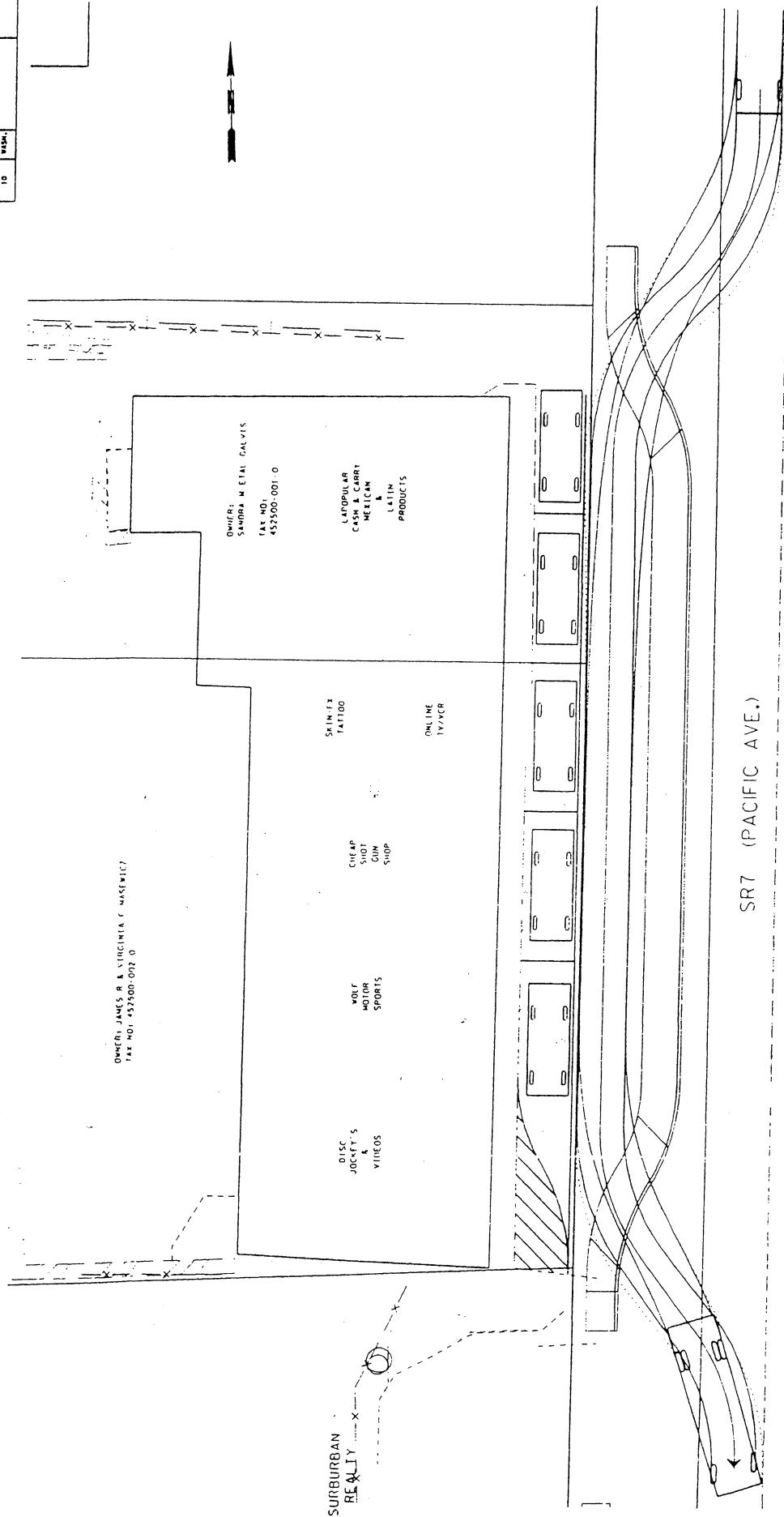
Dated at Olympia, Washington, this 9th day of August, 2004.


Representative, Office
of Administrative Hearings

EXISTING 50' RIGHT OF WAY
EXISTING CURB LINE
PROPERTY BOUNDARY LINES
EDGE OF LANES AND EDGE OF SHOULDER
EXISTING FENCE

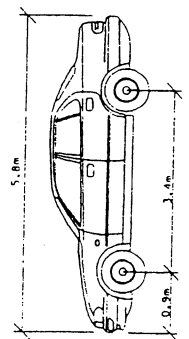
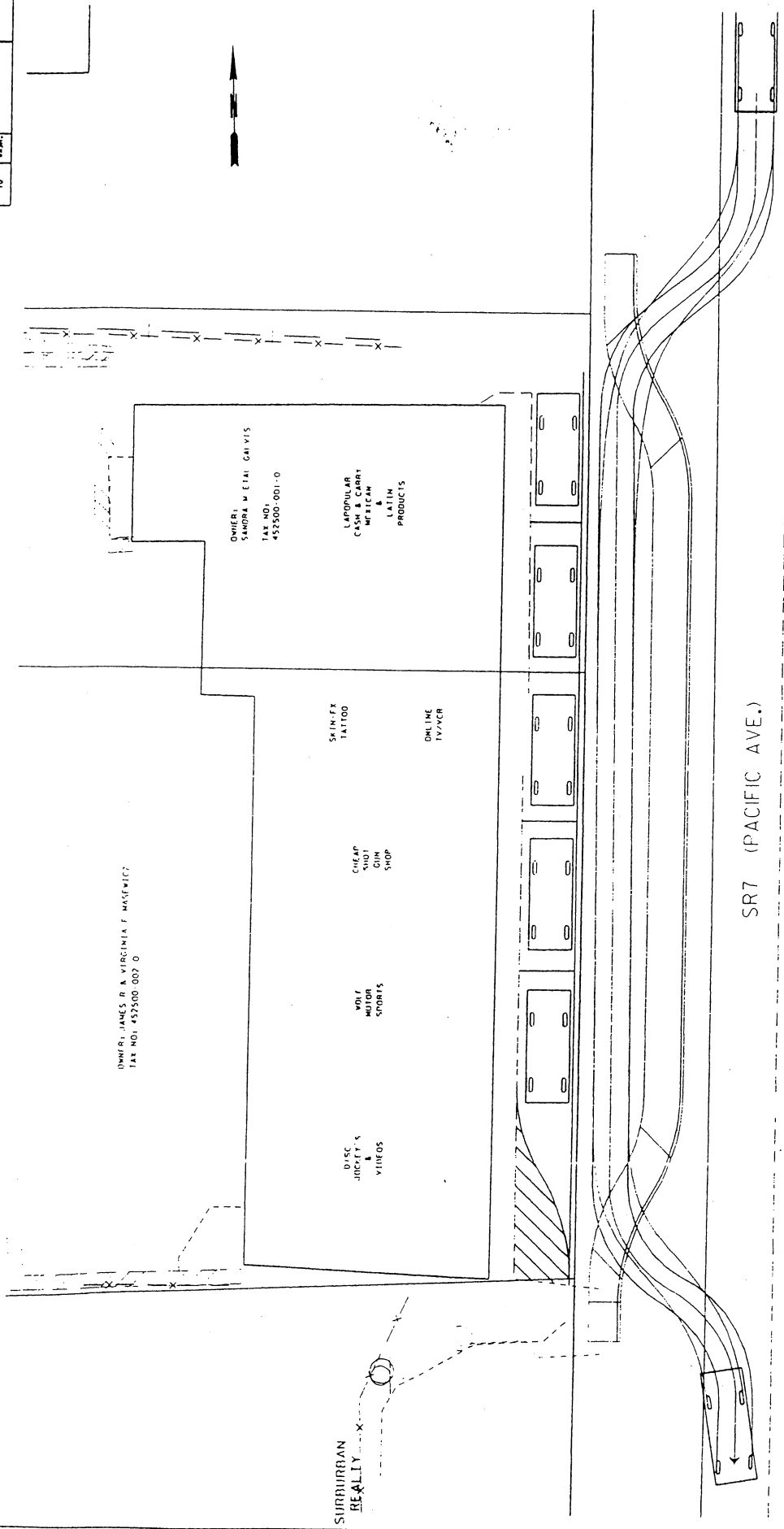
CEMENT CONCRETE SIDEWALK
CEMENT CONCRETE DRIVEWAY APPROACH
EXISTING RIGHT OF WAY

GALVIS DOT
300000019



T. 19 N., R. 3 E., W.M. SECTION 9

SECTION NO.	10	DATE	10/10/00	BY	W.M.	PROJECT NO.	
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LEGEND

- FRONT WHEEL PATH
- REAR WHEEL PATH
- MINIMUM TURNING RADIUS USED = 6.40m

SR7
SR 507 TO SR 502 - STAGE 2

EXHIBIT NO II-3

SCENIC IMPROVEMENT PLAN

PENNE COUNTY
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
CLYDE, WASHINGTON

NOT TO SCALE

GALVIS DOT
3000000021

APPENDIX 7

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6
7 BEFORE THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

8 In the matter of :

NO. OAH No. 2003-DOT-0022

9 JAMES R. & VIRGINIA F.
10 MASEWICZ.,

FINAL ORDER

11 Appellant

12 v.

13 STATE OF WASHINGTON,
14 DEPARTMENT OF
TRANSPORTATION,

15 Respondent

16 The reviewing officer, Harold Peterfeso, P.E., State Design Engineer for the
17 Washington State Department of Transportation, having considered the record created by
18 Administrative Law Judge Selwyn S.C. Walters, and also considering: (1) Trial Brief of
19 James & Virginia Masewicz; (2) Appellants' October 25, 2004 letter to supplement their trial
20 brief; and (3) Respondent's Response to Petition for Review of Initial Agency Order,

21 ORDERS AS FOLLOWS:

22 1. The Findings of Fact, Conclusions of Law and Initial Order, dated October 8,
23 2004, in the above entitled matter is affirmed and is attached hereto and incorporated in its
24 entirety by this reference, except for the amendments following:
25
26

GALVIS DOT
300001521

FINAL ORDER

1 a. Finding of Fact 4 – Amend “Marked on the Appellants’ property and
2 state’s right —of-way are parking spaces for three vehicles” to read: Before the Department’s
3 proposed SR 7 safety project, Appellants’ make use of up to twelve spaces for parking
4 vehicles; however, the vehicles, when parked, are located both on Appellants’ property and on
5 state-owned highway right of way.

6 b. Finding of Fact 6 – Delete “The Pierce County government and other
7 local governments may also add landscaping and other complementary features to the
8 project.”

9 c. Finding of Fact 15 – Amend “This configuration does not eliminate the
10 three spaces for vehicular parking at the businesses” to read: After the Department’s proposed
11 safety project, Appellants will have three parking spaces, where vehicles, when parked, will
12 be located only on Appellants’ property, and will not also require the use of or be located on
13 state-owned highway right of way. The Department’s proposed access as referenced in
14 Attachment A does not eliminate Appellants’ three legitimate parking spaces.

15 d. Finding of Fact 17 – Amend “The Appellants will not loose (sic) spaces
16 they previously used for parking. In any case, the Appellant’s use of the state’s right-of-way
17 for parking was not permitted or otherwise authorized by the Department” to read:
18 Appellants’ historical use of the state-owned highway right of way for parking was not
19 permitted or otherwise authorized by the Department. Before the Department’s proposed
20 safety project, Appellants had room for three legitimate parking spaces; these parking spaces
21 will not be eliminated by the SR 7 safety project.

22 e. Conclusion of Law 11 – Amend “Under the plan that I conclude is
23 reasonable, the Appellants will not loose (sic) spaces they previously used for parking” to
24 read: Under the plan that I conclude is reasonable, the Appellants will retain the room that
25 they previously had for three lawful parking spaces located on their property.

26
GALVIS DOT
300001522


1 f. Conclusion of Law 12 – Amend “The property where Appellants’
2 customers and tenants parked their vehicles was not the Appellants’ property. Not being able
3 to use that property for parking does not make the Appellants’ access unreasonable” to read:
4 Approximately half of the property where Appellants’ customers and tenants parked their
5 vehicles was not the Appellant’s property, but state-owned highway property. Not being able
6 to use the state-owned highway property for parking does not make the Appellants’ access
7 unreasonable.

8 2. Appellants James R. Masewicz and Virginian F. Masewicz. will have
9 reasonable access to and from State Route 7 pursuant to the Department’s access plan
10 referenced as Attachment A and attached to and incorporated by this Final Order.

11 3. Pursuant to RCW 34.05.470, any party may request reconsideration of this
12 Final Order within ten (10) days of the date that the Final Order is served. Specific grounds
13 for reconsideration must be stated in the request. No petition for reconsideration will stay the
14 effect of this Final Order. The filing of a petition for reconsideration is not a prerequisite for
15 judicial review, and an order denying reconsideration is not subject to judicial review.

16 4. Pursuant to RCW 34.05.542, a petition for judicial review of this Final Order
17 shall be filed with the court and served on the agency, the office of the attorney general, and
18 all other parties of record within thirty (30) days after service of this Final Order.

19 DATED this 21 day of January 2005.

20
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22 
23 HAROLD PETERFESO, P.E., Reviewing Officer
24 State Design Engineer
25 Washington State Department of Transportation
26

GALVIS DOT
300001523

RECEIVED

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF TRANSPORTATION
ATTORNEY GENERAL'S OFFICE
TRANSPORTATION & PUBLIC
CONSTRUCTION DIVISION

MAILED
OCT - 8 2004
OLYMPIA OAH

In the Matter of:

JAMES R. & VIRGINIA F. MASEWICZ

Appellants

v.

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION

Respondent.

OAH Docket No. 2003-DOT-0022

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
INITIAL ORDER**

STATEMENT OF THE CASE

This is an adjudicative proceeding instituted at the request of the Appellants, James R. & Virginia F. Masewicz, to challenge an October 27, 2003, decision of the Department of Transportation (Department) to change Appellants' existing access connection to State Route 7.

The Appellants requested an adjudicative hearing on October 23, 2003.

The matter came before Administrative Law Judge Selwyn S. C. Walters for a full hearing on August 11, 2004, at the Office of the Attorney General, 1019 Pacific Avenue (The Washington Building), Tacoma, Washington. Assistant Attorney General, John Salmon, represented the Department of Transportation. C. Joseph Sinnitt, Esquire, represented the Appellants.

The undersigned, having considered the evidence and the testimony, now enters the following findings of fact and conclusions of law:

COPY

FINDINGS OF FACT

1. The Appellants, James R. & Virginia F. Masewicz, are the owners of a parcel of property located on the west side of the northern terminus of State Route (SR) 7 at mile post 52.282, Pierce County, Washington. The parcel's Pierce County Tax Parcel Number is 452500-002-0. The size of the parcel is approximately 18,280 square feet (about, .42 acres). The parcel extends 182 feet sloping steeply westwards towards 3rd Avenue. Although 3rd Avenue is a residential street, it does not provide alternative access to the Appellants' property because of the steep grade between SR 7 and the street. A building approximately 6,279 square feet constructed circa 1952 is located on the parcel. The building covers the entire frontage of the property.
2. Over the past half century previous owners have used the building for business purposes and their customers have parked their vehicles in front of the building on the owners' property and on the state's right-of-way. The Appellants purchased the improved property approximately fifteen years ago and currently run a retail business and rent commercial and residential spaces to several business and individuals. The Appellants own Disk Jockeys and Video. The Appellants' business tenants are Online TV, owned by John Lee, Park Avenue Auto, owned by Pat Vasser, Skin Fx, owned by William Cryder, and LePopular, owned by Alexander Moncada. The Appellants' residential tenants are Brenda Fedrighi and her two children, Linda Lubas, Mike Ramsey, and Greg Trexlor.
3. Because of the steep grade of the westward slope of the parcel the Appellants, tenants, customers, and suppliers can only enter the businesses from SR 7. The Appellants, their customers and suppliers, their tenants and their suppliers and customers, and the Appellants' residential tenants park their vehicles in front of the building

on the Appellants' property and on the state's right-of-way. The Appellants have an informal arrangement with an adjoining property owner to use the property owner's lot for parking. Customers, suppliers, and salespeople arrive at the businesses in a variety of vehicles including pick-up trucks, vans, delivery trucks, and cars. Customers and suppliers arriving in their motor vehicles encroach on the shoulder or right-of-way of SR 7 to park their vehicles on the Appellants' property and the state's right-of-way.

4. Vehicles enter and leave the businesses on the Appellants' property along the entire frontage with SR 7. Marked on the Appellants' property and the state's right-of-way are parking spaces for three vehicles. The property has no curbs, driveways, or other structures to define the particular access point to the businesses. The property just merges into the shoulder of the roadway and then into SR 7.

5. State Route 7 (also referred to as Pacific Avenue) is a class IV state highway carrying vehicular traffic north-south between the neighborhoods of Parkland and Spanaway, and the city of Tacoma. At the time SR 7 was built the area was primarily rural. It is now urbanized. The SR 7 roadway in front of the Appellants' property consists of two lanes of traffic on either side of the centerline. The pavement in front of the Appellants' property is flat. The state acquired the 20 feet right-of-way in 1928.

6. Since at least 1998 the Department designed a project to improve safety along a five-mile segment of roadway on SR 7 between SR 507 (the Roy "Y") and SR 512. The Department's proposal responded to community concerns about safety. The name of the project is "SR 7 Safety Improvement." The Department intends to construct throughout the project driveways, sidewalks, drains, signal systems, bicycle lanes, and

street lights. The Pierce County government and other local governments may also add landscaping and other complementary features to the project.

7. On October 27, 2003 the Department sent a notice and a draft design to the Appellants informing them of the SR 7 Safety Improvement Project and the action the Department intended to take regarding access from their property to SR 7. The Department's letter provides in relevant part as follows:

Our research for this project has determined that the businesses on your property currently use the state right-of-way for parking. Our construction of the proposed sidewalks, drainage ditches and other improvements will require the utilization of the existing state right-of-way. After we construct the proposed improvements as shown on the enclosed plans, you will no longer be able to use the state right-of-way for parking. For your information state law, RCW 47.32.120, generally prohibits the use of state highway right-of-way by business patrons or customers.

We have determined that it is not practicable or safe to provide direct vehicular access to State Route 7 from your property, because there would be no place vehicles leaving the highway to park. Should you make improvements or modifications to your property that would accommodate parking or otherwise enable safe vehicular access, your property may become eligible for a permit allowing a direct access to State Route 7.

.....

8. The Department classifies the five mile stretch of SR 7 a "high accident corridor". The Department defines "high accident corridor" as a highway, one or more miles long, that has a higher accident rate and more severe accidents over a period of time (usually four years) in comparison to similar highways throughout the state. Within high accident corridors the Department identifies "hazardous accident locations." Hazardous accident locations are less than one mile long (usually 1/10 of a mile) that have a higher than average rate of severe accidents during a two year period. Every biennium from 1993

through 2003 the Department has classified as a hazardous accident location the stretch of roadway within which the Appellants' property is located.

9. The Department intends to modify access and egress to Appellants' property along the highway pursuant to current highway access management laws, chapter 47.50 Revised Code of Washington (RCW), and chapters 368-51 and 468-52 Washington Administrative Code (WAC).

10. The Department recorded approximately 400 accidents per year along the five mile long segment of SR 7 it intends to improve. The accidents are predominantly "angle" and "rear-end" accidents. "Angle" accidents involve a vehicle entering or exiting the highway dealing with access points. "Rear end" accidents are usually associated with congestion or access points.

11. The segment of SR 7 at issue in this case has random access or undefined access because it has full-frontage access to SR 7. There are no defined driveways or structures to limit vehicle access to certain points of entry or exit off of the highway. The Department determined that such undefined or full-frontage access properties pose a traffic safety problem. Vehicle movement is unpredictable either entering or leaving the property when there is full-frontage access. Pedestrians are more at risk with undefined access and exit sites.

12. The Department identified a number of problems with the SR 7 segment that it believed contribute to the "hazardous accident" rating. The first problem includes the full-frontage access or undefined ingress and egress to the property and business. Secondly, the road has no sidewalks which is more dangerous for pedestrians.

13. In addressing the identified safety problem, the Department relied on well accepted published studies that support the view that reducing the number of access points along a highway reduces accidents by up to 40%. Similarly, the concept of defining access points by constructing driveways is a generally accepted means of improving highway safety and has long been a part of the Department's design standards.

14. Although the data shows in three years there was no more than one accident directly in front of the Appellants' property (that is, at mile post 52.282), there were no injury accidents over a ten year period, and most of the accidents occurred in the north bound lanes, the Department designated the entire five-mile a "high accident corridor". The average daily traffic volume along the section of SR 7 encompassing the Appellants' property increased from 39,000 to 43,000 between the years 1997 through 1999.

15. Under the SR 7 improvement project the Department will install sidewalks, curbs, gutters, and concrete driveways. Regarding Appellants' access, the Department abandoned its proposed action described in its October 27, 2003, letter and accompanying draft design plan. The Department proposes access to the subject property outlined in a design plan attached to this decision and incorporated by reference as Attachment "A". Under this design the Department eliminated swales and plans to install a 6 foot cement concrete sidewalk in front of Appellants' property. The Department will allow use of the state's right-of-way to ingress and egress the property. This configuration does not eliminate the three spaces for vehicular parking at the businesses. Page 3 of Attachment "A" represents computer generated turning templates offered by the Department to examine the impact of the improvements upon the property. The project does not unreasonably limit access by any vehicle using the Appellants' property.

16. The undersigned finds that a cement concrete sidewalk will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route and the Appellants' property. Pedestrians will be safer along designated sidewalks.

17. Prior to the implementation of the Department's project improvements there were no defined driveways, sidewalks, or structures to limit vehicle access to certain points of entry or exit off the highway and Appellants' property. Such undefined, full-frontage access pose a traffic safety problem. Vehicle movement is unpredictable, and pedestrians are more at risk. The Appellants' property will have reasonable vehicle access after the implementation of the project's improvements. The Appellants will not lose spaces they previously used for parking. In any case, the Appellants' use of the state's right-of-way for parking was not permitted or otherwise authorized by the Department.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the persons and subject matter of this case pursuant to chapter 34.05 RCW (the Administrative Procedure Act), and WAC 468-51-160.

2. The Washington State Department of Transportation regulates vehicular access and connections to or from the state highway system in order to protect the public health, safety, and welfare. RCW 47.50.030. The Washington State Legislature found that uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system. RCW 47.50.010(1)(b). The development of an access management program will enhance the development of an effective transportation system and increase the traffic-carrying capacity of the state

highway system and thereby reduce the incidences of traffic accidents, personal injury, and property damage or loss. RCW 47.50.010(1)(c).

3. The public policy of the state announced by the Legislature at chapter 47.50 RCW (the Access Management law) provides the access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a safe and efficient highway system; and that every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property. RCW 47.50.010(3). RCW 47.50.010(4) continues to emphasize that the purpose of the highway access management law is to provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the findings and public policy announced by the Legislature. The Department issued rules to implement the provisions of chapter 47.50 RCW.

4. WAC 468-52-040 establishes an access control classification system consisting of five classes. The classes are arranged from the most restrictive, class one, to the least restrictive, class five. This access control classification system does not include highways that have been established as limited access highways in compliance with chapter 47.52 RCW. SR 7 is a class four highway for access management purposes. WAC 468-52-040(4).

5. The Department's rules related to the closure or alteration of existing access connections are set out at WAC 468-51-130 and provides:

Any unpermitted connections to the state highway system which were in existence and in active use consistent with the type of connection on July 1, 1990, shall not require the issuance of a permit and may continue to provide connection to the state highway system, unless the property owner had received written notification initiating connection closure from the department prior to July 1, 1990, or unless the department determines that the unpermitted connection does not meet minimum acceptable standards of highway safety and mobility based on accident and/or traffic data or accepted traffic engineering criteria, a copy of which must be provided to the property owner and/or permit holder and tenant upon written request. The department may require that a permit be obtained if a significant change occurs in the use, design, or traffic flow of the connection or of the state highway. If a permit is not obtained, the department may initiate action to close the unpermitted connection point in compliance with RCW 47.50.040. Any unpermitted connection opened subsequent to July 1, 1990, is subject to closure by the department.

6. Relatedly, at RCW 47.50.090(3)(d), access management standards shall include, but not be limited to, connection location standards, safety factors, design and construction standards, desired levels of service, traffic control devices, and effective maintenance of the roads.

7. In this case, there are no defined driveways, sidewalks, or structures to limit customers' vehicle access to certain points of entry or exit off the highway and Appellants' property. Vehicle movement is unpredictable, and pedestrians are at risk. The Department properly designated the entire five-mile a "high accident corridor" and identified along the corridor "hazardous accident locations". The evidence shows the average daily traffic volume along the section of SR 7 encompassing the Appellants' property increased from 39,000 to 43,000 between the years 1997 through 1999, and the Department recorded approximately 400 accidents per year. The evidence shows the Appellants' property is located within that segment of SR 7 the Department has designated since 1993 as a hazardous accident location.

8. Accordingly, I conclude the increase traffic flow, the high rate of accidents, the absence of driveways and sidewalks, and the high accident corridor and hazardous accident location designation, are a significant change in the use, design, and traffic flow of SR 7 and the Appellants' property.

9. The state's established public policy is to protect the citizen's health, safety and welfare by regulating access to state highways. SR 7 has grown from a country road to a busy highway through an urbanized area. WAC 468-52-060 promotes highway uniformity and continuity and requires the undersigned to consider the five mile segment of SR 7 as one unit, not discreet and separate parts identified by a certain number of accidents. Attaching a different characterization to every distance, whether a mile or less, based on the number of accidents in that discreet distance is unreasonable and unsafe, and is not supported by the access management law or the Department's rules. It is possible less accidents occurred on the roadway directly in front of the Appellants' property, or that more accidents happen at one place than another. However, the five mile segment should be planned and improved with uniformity because the evidence supports the Department's designation of the roadway as a high accident corridor, and a stretch of roadway within which the Appellants' property is located as a hazardous accident location. See, WAC 468-52-060.

10. The undersigned concludes that the Appellants' property will have reasonable access under the SR 7 Safety Improvement Project. The Department's proposed access to the subject property is outlined more fully in Attachment "A" attached to this decision and incorporated by reference. The Department will install a 6 foot cement concrete sidewalk on SR 7 in front of Appellants' property. The Department will allow use of the state's right-

of-way to ingress and egress the property. A cement concrete driveway approach and cement concrete sidewalk will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route and the Appellants' property. Pedestrians will be safer along designated sidewalks.

11. Under the plan that I conclude is reasonable, the Appellants will not lose spaces they previously used for parking. The fact that the Appellants do not have the particular access they believe necessary does not make the access unreasonable. Here the Appellants use the state's right-of-way for parking without authorization from the Department. Absent a lease, license, or permit from the Department an adjoining owner is not authorized to use the state's right-of-way. See, WAC 468-30-110, and generally, chapter 468-34 WAC. A property owner may not acquire an interest in state highway property by adverse possession. See, *State v. Scott*, 89 Wash 63, 76, 154 Pac. 165 (1916); *Mueller v. Seattle*, 167 Wash. 67, 75, 3 P.2d 994 (1932).

12. Further, the Appellants' right to have their desired access is subordinate to the public's right to a safe and efficient highway. The Appellants will not have to use any of their property or pay for any of the improvements. The property where the Appellants' customers and tenants parked their vehicles was not the Appellants' property. Not being able to use that property for parking does not make the Appellants' access unreasonable. Growth and development have made the SR 7 corridor unsafe for vehicular and pedestrian traffic. A cement concrete driveway approach and cement concrete sidewalk will improve highway safety.

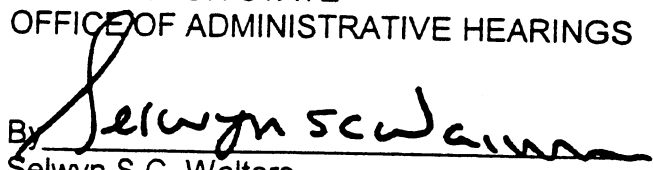
13. I conclude the Department's plan provides reasonable access for the Appellants' property and adds a safe and well planned road with a defined traffic flow for drivers and pedestrians, and is in the best interest of the public all around.

ORDER

NOW THEREFORE the proposed Department action installing a 6 foot cement concrete sidewalk on SR 7 in front of Appellants' property, and allowing use of the state's right-of-way to ingress and egress the property, which plan is depicted in a design attached and incorporated in this decision as Attachment "A" is **HEREBY ORDERED AFFIRMED**. This appeal is **ORDERED DISMISSED**.

Dated at Olympia, Washington, on the date of mailing.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

By 
Selwyn S.C. Walters
Administrative Law Judge
PO Box 42489
Olympia, Washington 98504-2489

NOTICE TO PARTIES

This Initial Order may be appealed pursuant to the Administrative Procedures Act, chapter 34.05 RCW and WAC 468-10-520. If no appeal is served on the Washington State Access and Hearing Engineer, Transportation Building, PO Box 47329, Olympia, WA 98504-7329, within 20 days of the date this Initial Order was mailed to you this Initial Order becomes final.

Copies mailed to:

Appellants:

James R. & Virginia F. Masewicz
112230 Pacific Ave
Tacoma WA 98444
Telephone (253) 241-6309

Appellants' Representative:

C. Joseph Sinnitt, Attorney at Law
Sinnitt & Sinnitt Inc PS
3641 N Pearl, Unit D
Tacoma WA 98407
Telephone (253) 759-7755

Assistant Attorney General:

John Salmon, Asst Attorney General
Office of the Attorney General
Transportation & Public Construction Div
PO Box 40113
Olympia WA 98504-0113
Telephone (360) 753-1622

cc: Barbara Cleveland, OAH, MS 42488

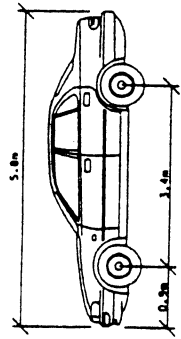
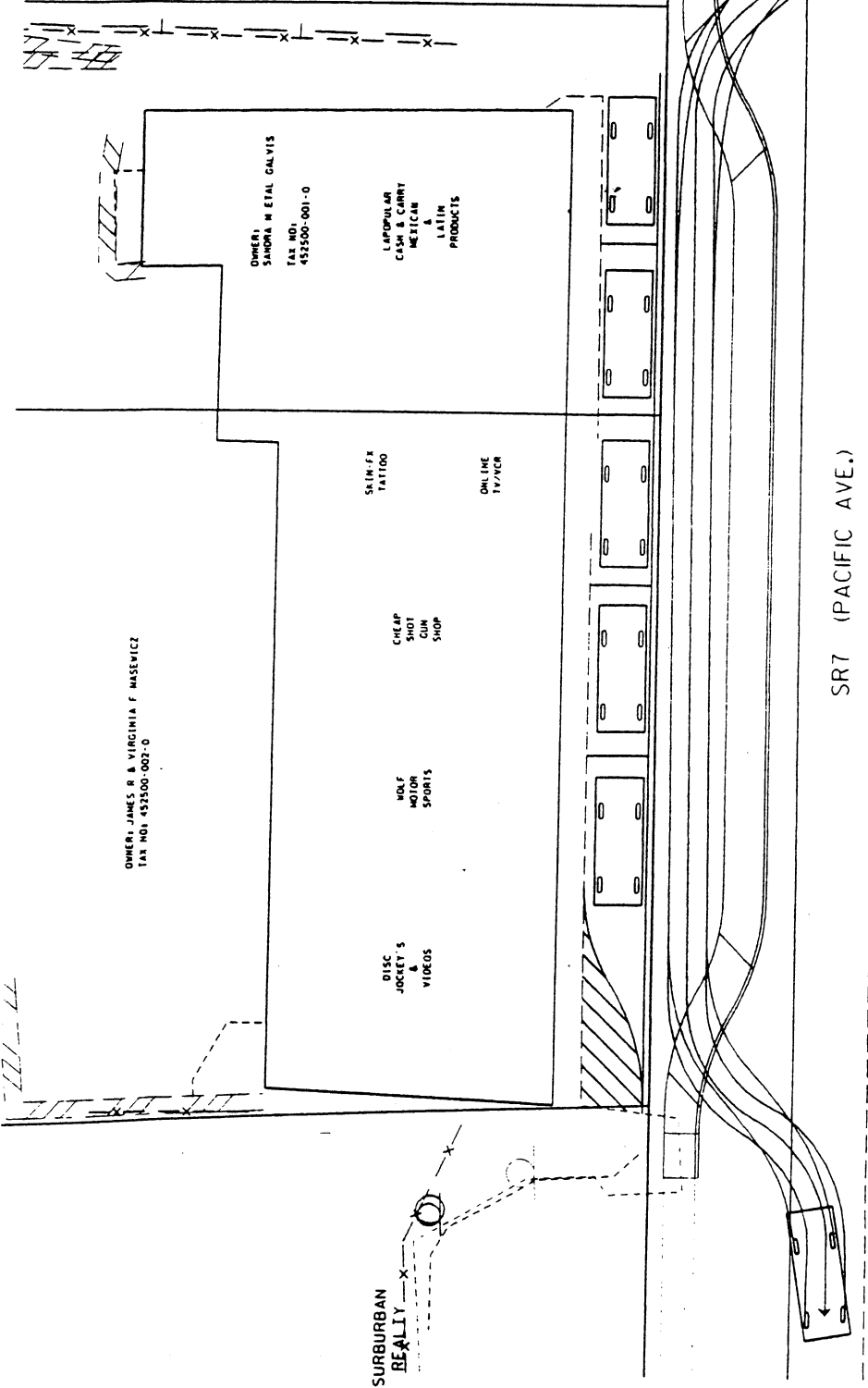
STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent.

Dated at Olympia, Washington, this 8th day of October, 2004
Shiela Koochugian
Representative, Office of
Administrative Hearings

T. 19 N., R. 3 E., W.M. SECTION 9

DATE	FILE	DATE	FILE
10	10/10/04		



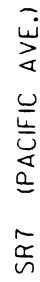
LEGEND

- FRONT WHEEL PATH
- REAR WHEEL PATH
- MINIMUM TURNING RADIUS USED = 6.4m

SR7
SR DOT TO SR 50 - STAGE 2
EXHIBIT NO II-3
METRICAL APPROPRIATE PLAN
PEACE COUNTY
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
CLYDE, WASHINGTON
NOT TO SCALE

GALVIS DOT
300001537

SECTION 9



EXISTING SAT RIGHT OF WAY
EXISTING CURB LINE
PROPERTY BOUNDARY LINES
EDGE OF LANES AND EDGE OF SHOULDER
EXISTING FENCE

CEMENT CONCRETE SIDEWALK
CEMENT CONCRETE DRIVEWAY APPROACH
EXISTING RIGHT OF WAY

NOT TO SCALE

300001538

APPENDIX 8

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6
7 BEFORE THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

8 In the matter of :

NO. OAH No. 2003-DOT-0027

9 ASH RESOURCES, L.L.C.,

FINAL ORDER

10 Appellant

11 v.

12 STATE OF WASHINGTON,
13 DEPARTMENT OF
TRANSPORTATION,

14 Respondent

15
16 The reviewing officer, Harold Peterfeso, P.E., State Design Engineer for the
17 Washington State Department of Transportation, having considered the record created by
18 Administrative Law Judge Selwyn S.C. Walters, and also considering: (1) Appellant's Trial
19 Brief; (2) Respondent's Response to Petition for Review of Initial Agency Order; (3)
20 Appellant's October 19, 2004 letter supplement to Appellant's Trial Brief; and (4)
21 Respondent's Response to Supplemental Petition for Review of Initial Agency Order,

22 ORDERS AS FOLLOWS:

23 1. The Findings of Fact, Conclusions of Law and Initial Order, dated September
24 24, 2004, in the above entitled matter is affirmed and is attached hereto and incorporated in its
25 entirety by this reference.
26

FINAL ORDER

1

GALVIS DOT
300000881

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
905 Plum Street, Building 3
PO BOX 40113
Olympia, WA 98504-0113
(360) 753-6126 Facsimile: (360) 586-6847

2. Appellant Ash Resources, L.L.C. will have reasonable access to and from State Route 7 through a single 50 foot road approach (driveway) after the implementation of the SR 7 Safety Improvement Project.

3. Pursuant to RCW 34.05.470, any party may request reconsideration of this Final Order within ten (10) days of the date that the Final Order is served. Specific grounds for reconsideration must be stated in the request. No petition for reconsideration will stay the effect of this Final Order. The filing of a petition for reconsideration is not a prerequisite for judicial review, and an order denying reconsideration is not subject to judicial review.

4. Pursuant to RCW 34.05.542, a petition for judicial review of this Final Order shall be filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty (30) days after service of this Final Order.

DATED this 7th day of December 2004.

Harold Peterfeso
HAROLD PETERFESO, P.E., Review
State Design Engineer

HAROLD PETERFESO, P.E., Reviewing Officer
State Design Engineer
Washington State Department of Transportation

MAILED
SEP 24 2004
OLYMPIA OAH

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER

LLC, Gordon Garl, owner of G & L Bark Supply, Dana Proietti, of G & L Bark Supply, and Chris Brown, a traffic engineer, presented testimony for the Appellant.

FINDINGS OF FACT

1. The Washington State Department of Transportation (Department) sent the Appellant, Ash Resources, LLC a notice of planned Safety Improvement Project on State Route 7 (SR 7), between 112th Street and 188th Street, Pierce County, Washington. The notice provided in relevant part:

Under the access management laws (RCW Ch. 47.50 and related regulations set forth in Washington Administrative Code (WAC) Chapters 468-51 and 468-52), WSDOT may restrict direct access from a property to a state highway if reasonable access from the property is available. Currently your property has access to State Route 7 (Pacific Avenue), from multiple access points. WSDOT plans to eliminate all but one access point to State Route 7 (Pacific Avenue) from your property as part of the upcoming safety improvement project. The future configuration of your access to the public road system is shown on the enclosed plan.

Our research shows that one of your access connections is non-conforming to State Route 7, and both of your existing access connections are unpermitted. WSDOT's project will result in an adjustment to the location of your approach, thus we will issue you a new permit reflecting the new approach location. The configuration and location of your approach is shown on the enclosed plan. In order to construct your new approach, we will need to pave approximately the first 20 feet of your property. In some cases, WSDOT may have to perform additional work to build your new approach, such as but not limited to, adjusting landscaping or curbing, pavement marking, etc. This work will be completed at no cost to you.

Attached to the Department's notice was Access Connection Permit No. 43028 and a draft design showing the configuration and location of the Appellant's access to SR 7.

2. The property at issue in this case consists of three individual parcels with an approximate area of 7.5 acres. The Appellant owns the property which it leases to G & L Bark Supply. G & L Bark Supply is a business selling landscape materials such as beauty bark, top soil, and gravel to residential and commercial customers. Gordon Garl is the owner of the business. The business is currently busy and doing well.

3. The property currently has two driveways to SR 7 of approximately 25 feet in width each. Neither of these two driveways are permitted by the Department. Suppliers and customers arrive at the property through either of the two driveways in a variety of vehicles including large semi trucks, dump trucks and trailers, solo dump trucks, cars and pick ups. The trucks can be from 30 feet long to 40 feet long, and occasionally as long as 50 feet. The flow of traffic to and from the property is heavy with suppliers hauling an average of two to three semi loads, or 6 trips per day. On occasion, there has been seventy-five trips in a day.

4. The business has operated at the subject property since 1996. The volume of business has increased significantly since that time. The traffic volumes have also increased, and Mr. Garl believes he has a certain competitive advantage because of the two driveways to SR 7. The property is configured so that vehicles may enter and leave G & L Bark at any of the two driveways. The property has approximately 430 feet of SR 7 frontage. There are no curbs, or other structures to define the particular access points. SR 7 blends into the road shoulders and into the subject property.

5. SR 7 was built in 1920 through a rural area. The old state highway carries traffic north-south between the Parkland-Spanaway area and Tacoma. In the 1940s, the road was widened to its current width. Overtime the surrounding area urbanized. Currently, SR 7 includes a total of 5 lanes each 11 feet wide. There are shoulders to the road but no sidewalks.

6. The SR 7 Safety Improvement Project proposed by the Department focuses on a five-mile long segment of highway from the intersection of SR 507 to the intersection of 112th Street. The five-mile stretch of SR 7 is classified by WSDOT as a "high accident

corridor". The Department defines the "high accident corridor" as a highway that has a higher accident rate and more severe accidents in comparison to similar highways. The Department seeks to modify a number of access and egress points along the highway pursuant to current highway access management laws.

7. The five-mile long segment of SR 7 to be improved recorded approximately 400 accidents per year. The Department maintains accident data and concludes that the accidents are predominantly "angle" and "rear accidents. "Angle" accidents typically involve a vehicle entering or exiting the highway dealing with access points. "Rear end" accidents are usually associated with congestion or access points.

8. Although the subject property has two driveways, access to SR 7 is random or undefined because the driveways are not defined driveways and there are no structures to limit vehicle access to certain points of entry or exit off the highway. The Department determined that such undefined access to SR 7 pose a traffic safety problem. Vehicle movement is unpredictable either entering or leaving the property when there is no defined entry and exit point. Pedestrians are more at risk with undefined access and exit sites.

9. The Department identified a number of problems with the SR 7 segment that they believe contribute to the "high accident" rating. The first problem includes the undefined ingress and egress to the property and business along the road. Second the road has no sidewalks, which is more dangerous for pedestrians. Although there is intermittent lighting along the segment, the lack of consistent lighting is a problem.

10. The Department reasonably relied on published studies that show that reducing the number of access points along a highway can reduce accidents by up to 40%. Similarly the principle of defining access points by constructing driveways is a generally

accepted means of improving highway safety and has long been a part of the Department's philosophy and design standards.

11. Although there are other points within the five-mile segment that have had more accidents than the section owned by the Appellant, the entire five-mile section was designated as a "high accident location". The entire volume of traffic along the section increased throughout the years from 1983 with a figure of 20,300 vehicles per day to the year 2002 with a figure of 39,000 vehicles per day. The Department classified the entire five mile segment as a "high accident location."

12. SR 7 is classified as a Class III highway and designated as such by the Department pursuant to chapter 468-52 WAC.

13. The Department's SR 7 Safety Improvement Project will install sidewalks, curbs, gutters, and concrete driveways. The undersigned finds that the structures will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route which includes the Ash Resources property. Pedestrians will be safer along designated sidewalks and crossings. Lightening will be installed to enhance safety. Traffic signals will regulate the flow of traffic.

14. The Department proposed to the Appellant in its original notice that an access permit be issued authorizing a 40 foot wide driveway. At hearing the Department effectively amended its notice to provide that an access permit be issued authorizing a 50 foot wide driveway. The Department will pay for the cost of the project and all project improvements will be built on the existing state owned right-of-way with no property acquired from the Appellant.

15. I find that the Department's proposal to provide that an access permit be issued authorizing a 50 foot wide driveway does not unreasonably limit the 40-foot and 50-foot long semi trucks and trailer combinations that use the subject property. The delivery trucks that currently patronize the premises could continue to access the premises. The Appellant's property will have reasonable vehicle access after the implementation of the project's improvements.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the persons and subject matter of this case pursuant to chapter 34.05 RCW (the Administrative Procedure Act), and WAC 468-51-150.
2. The Washington State Department of Transportation regulates vehicular access and connections to or from the state highway system in order to protect the public health, safety, and welfare. RCW 47.50.030. The Washington State Legislature found that uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system. RCW 47.50.010(1)(b). The development of an access management program will enhance the development of an effective transportation system and increase the traffic-carrying capacity of the state highway system and thereby reduce the incidences of traffic accidents, personal injury, and property damage or loss. RCW 47.50.010(1)(c).
3. The public policy of the state announced by the Legislature at chapter 47.50 RCW (the Access Management law) provides the access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a

safe and efficient highway system; and that every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property. RCW 47.50.010(3). RCW 47.50.010 (4) continues to emphasize that the purpose of the highway access management law is to provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the findings and public policy announced by the Legislature. The Department issued rules to implement the provisions of chapter 47.50 RCW.

4. According to WAC 468-52-060, "segments" of highways to be assigned a particular access control classification shall be defined by the Department. The length and termination of segments shall take into consideration the mobility and access needs of the traveling public, and the desired mobility characteristics of the roadway. The number of classification changes occurring along a particular highway shall be minimized to provide highway system continuity, uniformity, and jurisdictional boundaries. The responsibility of the assignment of a classification to a specific segment of highway shall be the responsibility of the Department.

5. WAC 468-52-060(2) continues to provide that the assignment of a classification shall take into consideration the type and volume of traffic requiring access and other operational aspects of access, including corridor accident history as well as other considerations.

6. Finally at RCW47.50.090(3)(d), access management standards shall include, but not be limited to, connection location standards, safety factors, design and construction standards, desired levels of service, traffic control devices, and effective maintenance of the roads.

7. Based upon the evidence provided, the undersigned concludes that the increase in the volume of business conducted on the Appellant's property, the increase in deliveries, the increase in the number of customers, and the increase in the size of the trucks make for a significant change in the use, design, and traffic flow on the Ash property.

8. The undersigned further concludes based upon the evidence that the increased traffic, the high accident rate on the SR 7 corridor, and the stated Washington State policy to protect the citizen's health, safety and welfare by regulating access to state highways makes for a significant change in the use, design, and traffic flow of SR 7. The highway has grown from a road through the county to a highway through an urbanized area with significant traffic. The five-mile segment should be considered as a unit, not broken into discreet sections where a certain number of accidents occurred. WAC 488-52-060 promotes highway uniformity and continuity. It is unreasonable and more likely than not, unsafe to try to characterize every mile a different classification. The five-mile segment is a "high accident location". Maybe more accidents happen at one place than another but the five-mile segment should be planned and improved with uniformity.

9. The undersigned concludes that the Ash Resources, LLC property will have reasonable access under the SR 7 Safety Improvement Project. The Appellant will have

a single 50 foot driveway that is able to accommodate adequately the largest of the delivery trucks that use the property. The fact that the Appellant does not have the particular access that it believes necessary does not make the access unreasonable. Once again as stated by decided legislative policy, the Appellant's right to have its desired access is subordinate to the public's right to a safe and efficient highway. The Appellant will not have to lose any of its property nor pay for any of the improvements. Not being able to use that property does not make the Appellant's access unreasonable. Reasonable access for the Appellant added to a safe and well planned road with a defined traffic flow for drivers and pedestrians is in the best interest of the public all around.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED the proposed agency action is affirmed and this appeal should be dismissed.

Dated at Olympia, Washington, on the date of mailing.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

By


Selwyn S.C. Walters

Administrative Law Judge

PO Box 42489

Olympia, Washington 98504-2489

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

SANDRA M. GALVIS, a divorced woman, and ALEXANDER MONCADA, a single man, d/b/a LA POPULAR CASH & CARRY MARKET, LLC; JAMES R. MASEWICZ and VIRGINIA F. MASEWICZ, husband and wife; and ASH RESOURCES, LLC.

Respondent/Cross-
Appellants,
v.

STATE OF WASHINGTON,
DEPARTMENT OF
TRANSPORTATION,

Appellant/Cross-
Respondent.

DECLARATION OF
SERVICE

Trish Grim, declares as follows:

I am a citizen of the United States of America and over 18 years of age and I am competent to testify to the matters set forth herein. On August 25, 2006, I caused a true and correct copy of the OPENING BRIEF OF APPELLANT, STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION

and this DECLARATION OF SERVICE to be hand delivered


by ABC Legal Services to counsel of record as follows:

Robert A. Wright
Faubion, Johnson & Reeder, P.S.
Lakewood Professional Village
5920 100th Street S.W., Suite 25
Lakewood, WA 98499

C. Joseph Sinnitt
Sinnitt & Sinnitt, P.S.
3641 North Pearl Street, Unit D
Tacoma, WA 98499

I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 25th day of August, 2006, at Olympia, Washington.



Trish Grim

FILED
COURT OF APPEALS
DIVISION II
06 AUG 25 PM 3:54
STATE OF WASHINGTON
BY _____
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